

The Role of the Leniency Programme in the Enforcement of Competition Law in the UK: A complementary enforcement procedure or an admission of the failure of enforcement authorities to tackle anticompetitive behaviour head on?

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by

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ABSTRACT

Leniency Programmes have been introduced as a complementary measure in the enforcement of competition law in detecting cartels, on the basis that hard to find evidence will be provided by undertakings coming forward to confess, in exchange for immunity or reduction in fines. The advantages of leniency are deemed to be twofold, since evidence is thereby expected to be given voluntarily, and in turn it would save up the limited resources available to enforcement authorities, by reducing lengthy investigations in search of evidence. Therefore, the widely accepted view by regulators, economists, and lawyers alike is that leniency is by far the most effective method of detecting and deterring anticompetitive activities by undertakings. An 'undertaking' covers any entity engaged in an economic activity that offers goods or services in a given market. In the UK, Chapter I of the Competition Act 1998 governs prohibitions that fall within the category of cartels of which price-fixing, market or customer sharing, agreements to restrict production or supply, and bid-rigging are the most serious 'hard-core cartels'. This study evaluates the efficacy of the Leniency Programme in the enforcement of competition law applied in respect of cartel infringements based on cases decided by the UK's principal enforcement authority. Chapter I cases decided and published over a twelve-year period, since the Competition Act 1998 came into force, have been analysed in order to evaluate whether the leniency programme has been an incentive for colluders to apply for leniency. The results indicate that very few leniency applications were submitted voluntarily before an investigation was begun by the enforcement authority. Moreover, the detection rate of Chapter I cases on average has been very low over the twelve-year period, less than 2 cases per year, excluding settlements. The research also shows that contrary to the accepted view that evidence relating to cartels is difficult to find, cartels studied in this thesis have left a trail of both electronic, and other evidence that the authorities were able to seize. Further, the leniency applicants were not always reliable witnesses, and despite leniency, the enforcement authorities had to conduct lengthy investigations, negating the cost saving assertion and taking resources away from ex officio interventions by the authorities. The conclusion drawn from this study is that rather than enhancing detection and deterrence of anticompetitive behaviour by undertakings, the leniency programme overlaps, and in effect, undermines the public enforcement of competition law in the UK.

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LIST OF ABBREVIATIONS

ACPERA	Antitrust Criminal Penalty Enhancement and Reform Act 2004, (US)
AD	Antitrust Division, (US)
BIS	Department of Business, Innovation and Skills (now BEIS)
CA	Court of Appeal
CA 98	Competition Act 1998
CAT	Competition Appeal Tribunal
CC	Competition Commission
CJEU	Court of Justice of the European Union (formerly ECJ)
CJPA	Criminal Justice and Police Act
CMA	Competition and Markets Authority
CRA 15	Consumer Rights Act 2015
DG Comp	Directorate General of Competition, (EU)
DGFT	Director General of Fair Trading
DoJ	Department of Justice, US
EA 02	Enterprise Act 2002
EC	European Community (now European Union)
ECJ	European Court of Justice (now CJEU)
ECHR	European Convention on Human Rights
ECN	European Competition Network
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community (now European Union)
ERRA 13	Enterprise and Regulatory Reform Act 2013
EU	European Union
FTO	Fast Track Offer
GAO	Government Accountability Office, US
GC	General Court
ICN	International Competition Network

IOSCO	International Organization of Securities Commissions
IPT	Investigatory Powers Tribunal
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OFCOM	Office of Telecommunication
Ofgem	Office of Gas and Electricity Markets
OFT	Office of Fair Trading (now CMA)
Ofwat	Water Services Regulation Authority
ORR	Office of Rail and Road
RPM	Retail Price Maintenance
SMEs	Small and Medium-sized Enterprises
SO	Statement of Objections
SFO	Serious Fraud Office
SRO	Senior Responsible Officer
SSNIP	Small but Significant Non-transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKCN	UK Competition Network
UKRN	UK Regulators Network
US	United States

(Please note: Acronyms for Company names and/or cases are not included in the list)

CHAPTER 1

INTRODUCTION

1.1 Background

In the enforcement of Competition Law, the Leniency Programme is an administrative procedure intended to incentivise businesses that infringe Competition Law prohibitions to come forward and confess, and cooperate with the investigation so that they would be rewarded with immunity from prosecution or reduction in fines. Under the Leniency Programme, the enforcement authorities expect to obtain hard evidence which would otherwise be kept well hidden from the authorities by those involved in such infringements, and that, as a result, it would also save the limited resources available to the enforcement authorities. This thesis investigates the efficacy of the Leniency Programme as a complementary enforcement procedure, introduced by the UK enforcement authorities, in detecting Chapter I infringements prohibited by the Competition Act 1998 (CA 98), and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Under Chapter I, CA 98, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom are prohibited, unless exempt if certain conditions under section 3, CA 98 are met. According to the UK's former principal enforcement authority, the Office of Fair Trading (OFT), 'undertakings' and 'businesses' are interchangeable terms and mean any entity engaged in economic activity irrespective of their legal status.¹ The infringements of Chapter I, CA 98, referred to as cartels, are price fixing, bid rigging, output restrictions, and market allocation,² but the list is not exhaustive.³

In 2001, the then Department of Trade and Industry has said, '... competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness.'⁴ A House of Commons Library briefing paper has stated that 'Competition law seeks to curb

¹ OFT, Cartels and the Competition Act 1998: A guide for purchasers, (OFT435), 2005, p 2.

² Ibid, p 3; Competition Act 1998, section 2(2); Article 101 (1) of the Treaty on the Functioning of the European Union.

³ OFT, Agreements and concerted practices: Understanding competition law, (OFT401) 2004, paras 2.2 and 2.3 at 4, and para 3.3 at 13.

⁴ Department of Trade and Industry White Paper, *Productivity and Enterprise: A World Class Competition Regime*, Cm 5233, July 2001, para 1.1.

practices that would undermine competition.⁵ It can safely be said, therefore, that the UK competition policy is intended on achieving economic success by maintaining competition in the market. The UK's former Department for Business, Innovation and Skills (BIS) has stated that competition between businesses benefits consumers through providing greater choice, better quality products and services and helps to keep prices lower.⁶

The Leniency policy has been adopted in accordance with the EU Leniency Notice,⁷ as a complementary procedure which was expected to expedite detection and deterrence of anticompetitive behaviour. The purpose of this thesis is to explore whether the Leniency policy has fulfilled that expectation of expediting the detection and deterrence of competition infringements prohibited by Chapter I, CA 98.

This research does not seek to deal with the CA 98 prohibitions per se, but it attempts to elucidate, whether the Leniency Programme introduced subsequently into the enforcement of Chapter I, CA 98, as a complementary enforcement measure, has enhanced the detection and deterrence rate of anticompetitive behaviour. Therefore, the central focus is on the efficacy of the Leniency Programme in the enforcement of Competition Law in the UK.

The UK competition law is governed by the Competition Act 1998 (CA 98), modelled in accordance with the European Competition law which has supremacy over that of its Member States, and the Enterprise Act 2002 (EA 02), along with the Enterprise Reform and Regulatory Act 2013 (ERRA 13). The Consumer Rights Act 2015 (CRA 15) has also brought in new measures to strengthen the competition enforcement procedure in the UK. The element of 'dishonesty' needed to be proved in cartel cases previously, has been removed by the new changes. This thesis states the law and legal situation on UK's Competition Law up to the submission of this thesis in September 2016.

Under CA 98, any business willing to do so may apply for Leniency if they are involved in an infringement, in exchange for immunity or reduction in fines. At the outset, EA 02 has given the UK's principal competition enforcement authority at the time, the Office of Fair Trading (OFT), which is currently the Competition and Markets Authority (CMA), power to grant leniency to individuals who inform the OFT/CMA of their anticompetitive activities, and fully

⁵ Antony Seely, 'The UK competition regime' Briefing Paper No. 04814, *House of Commons Library*, 1 September 2016.

⁶ BIS, **Ref: 12/512**, Growth, Competition and the Competition Regime: Government Response to Consultation, 2012, Executive Summary, p. 5.

⁷ European Commission, Commission Notice on the non-imposition or reduction of fines in cartel cases, [1996] OJ C207/4-6, (Leniency Notice). Subsequently revised in 2002, and 2006.

cooperate with its investigation. Under the leniency policy, a whistleblower of cartel activity can obtain full immunity by way of a 'no action letter'⁸ from the OFT, similar to the leniency regime in operation in the US.

Leniency programmes have been thus adopted by all but one⁹ of the current twenty-eight Member States, including the UK, in accordance with the cooperation policy with the Commission.¹⁰ The member states cooperate with one another via the European Competition Network (ECN) on a confidential basis as regards anticompetitive investigations which may affect two or more member states. The leniency policy was borrowed from the US antitrust leniency programme,¹¹ and both EU and US enforcement authorities have hailed the Leniency Programme as the most effective tool in uncovering anticompetitive activities engaged in by businesses in breach of Competition Law.¹² The leniency policy has also been adopted by many other countries worldwide which implement competition regulations, as evident from the participant member states in the International Competition Network (ICN).¹³

The reason for the introduction of a Leniency Programme has been primarily due to the claim that enforcement authorities have found it difficult to detect anticompetitive activities by undertakings because such activities are operated in secret.¹⁴ Another advantage for the authorities is the claim that leniency is a measure that would enable saving up the limited resources available to enforcement authorities by reducing the workload involved in competition investigations.¹⁵

By offering leniency, the offenders are expected to come forward and confess to their illegal activities so that enforcement authorities may take deterrent measures, while those who come

⁸ OFT1495, Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process, 2013, pp 63 – 64.

⁹ Malta has drafted a Leniency Programme, but it remains unenforced as yet. See Ron Galea Cavallazzi and Liza Abela, 'Malta: Cartels & Leniency 2018' *ICLG*, 06.11.2017.

¹⁰ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, Official Journal C101 27/04 (2004). Of the current 28 Member States, only Malta does not have a Leniency Programme, although a draft has been made it remains unenforced as yet. See Ron Galea Cavallazzi and Liza Abela, 'Malta: Cartels & Leniency 2018' *ICLG*, 06.11.2017.

¹¹ Caroline Cauffman, 'The Interaction of Leniency Programmes and Action for Damages' (2011) 7(2) *Competition Law Review* 181-220, p.181.

¹² See Scott D Hammond, "Detecting and Deterring Cartel Activity through an Effective Leniency Program" speech at the International Workshop on Cartels, Brighton, England, November 2000; Alexander Italianer, 'Fighting Cartels in Europe and the US: different systems, common goals' speech at the Annual Conference of the International Bar Association (IBA), Boston, October 2013.

¹³ Hugh Hollman and William E Kovacic, 'The International Competition Network: Its Past, Current, and future Role' (2011) 20 *Minnesota Journal of International Law* 274-323, p.275.

¹⁴ European Commission, 'Cartels Overview' < ec.europa.eu/competition/cartels/overview/index_en.html > last accessed 03.02.2014; OFT press release, 'Leniency – confess your cartel to the OFT' < www.of.gov.uk/cartels-leniency > last accessed 04.02.2014; Richard Whish and David Bailey, *Competition Law*, (7th edn, OUP 2012), Ch. 10.

¹⁵ See Louis Kaplow and Steven Shavell, 'Optimal law enforcement with self-reporting of behaviour' (1994), 102(3) *Journal of Political Economy* 583-606, p. 584.

forward may be granted immunity from punishment or reduction in fines.¹⁶ Such applicants would also be protected by confidentiality from any disclosure to the public of their leniency statements submitted to the authorities, together with their business secrets. The applicants can also benefit from the additional Leniency Plus scheme if they reveal any other previously unknown cartels they are engaged in. Cartels are considered to be the most serious form of anticompetitive agreements by the Organisation for Economic Co-operation and Development (OECD).¹⁷ The most serious cartels can manifest in the form of price fixing, bid-rigging, output quotas or restrictions, and market sharing, according to the 'Competition Act 1998 and Cartels Guidance, 2014' issued by the OFT/CMA.

This thesis examines the efficacy of the Leniency Programme in the enforcement of Competition law, applied in respect of Chapter I, CA 98 prohibitions in the UK, based on decided cases by the UK's principal enforcement authority, which has been the OFT until its powers were transferred to the newly formed CMA, on 1 April 2014. Chapter I cases decided and published by the OFT over a 12-year period, since CA 98 came into force in 2000 up to 2012, comprising 24 cases have been analysed. Two of these relate to applications for exemptions, which do not warrant leniency but are nevertheless included for procedural value. The results are remarkable in that the widely held belief that leniency plays a major role in detecting and deterring cartels is proved to be far from the truth.

As cartels mainly operate in secret, enforcement authorities stress the difficulty in obtaining evidence for effective prosecution of those businesses that infringe the law.¹⁸ Scarcity of resources is blamed as another factor that hinders public enforcement. Kaplow and Shavell have put forward the view that easy access to evidence and reduction of enforcement costs can both be achieved by encouraging self-reporting.¹⁹ The law enforcers and commentators are of the view that leniency policy, which encourages self-reporting, has greatly increased the number of cartel cases that have been uncovered, much higher than prior to the introduction of the leniency policy into Competition Law.²⁰

¹⁶ OFT1495b, Quick Guide to Cartels and Leniency for Businesses, July 2013; OFT1495i, Quick Guide to Cartels and Leniency for Individuals, July 2013.

¹⁷ OECD Report: Hard Core Cartels, 2000, p.11.

¹⁸ See James M. Griffin, 'An Inside Look at A Cartel at Work: Common Characteristics of International Cartels' Speech before the American Bar Association Section of Antitrust Law 48th Annual Spring Meeting, Washington, D.C. April 6, 2000.

¹⁹ See Louis Kaplow and Steven Shavell, 'Optimal law enforcement with self-reporting of behavior' (1994) 102 (3) *Journal of Political Economy* 583-606; *Contra*, Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' (2005), Humboldt-University Berlin.

²⁰ See James M Griffin, 'The Modern Leniency Program After Ten Years - A Summary Overview of The Antitrust Division's Criminal Enforcement Program' Speech at The American Bar Association Section of Antitrust Law Annual Meeting, San Francisco, California, 12 August, 2003.

Both the US Department of Justice (DoJ) and the European Commission (hereafter the Commission), have extolled the success of their Leniency policies in uncovering cartels.²¹ They provide data in support of the enhanced number of cartels uncovered since the introduction of their revised Leniency Programmes respectively, and the resulting increase in fines.²² According to DoJ's James M Griffin, the revised leniency policy of 1993 increased the number of cartel confessions, from one per year under the old programme (the policy of 1978), to three per month.²³ In the EU, according to Joaquín Almunia, leniency application rate has risen to four per month.²⁴ In the UK, although no comparative figures are proclaimed as such, the leniency programme has been hailed as the bedrock of the enforcement process of competition law, by the UK government's Department for Business, Innovation and Skills (BIS).²⁵

1.2 Statement of the problem

It is clear from the pronouncements of the enforcement authorities that they view Leniency Programmes as playing a major role, if not *the* major role, in detecting cartels. However, it is possible that the enforcement authorities may be overstating their leniency policy success, particularly as their data are based on the detected cartels, and not much research has been done to investigate how widespread the problem is. On the other hand, the increase may well

²¹ Scott D Hammond, 'Cracking Cartels with Leniency Programs' presentation at the OECD Competition Committee Working Party No.3, Prosecutors Program, 18 October 2005, Paris, 'Since its revision in 1993, the Antitrust Division's Corporate Leniency Program has been the Division's most effective investigative tool', 'Cooperation from leniency applicants has cracked more cartels than all other tools at our disposal combined ...' < <https://www.justice.gov/atr/speeches-6> > last accessed 12.11.2017; Scott D Hammond, 'Cornerstones of an Effective Leniency Program', Speech before the ICN Workshop on Leniency Programs, 22-23 November 2004, Sydney. "companies have been fined over \$2.5 billion ... since 1997, with over 90 per cent of this total tied to investigations assisted by leniency applicants."; Mario Monti, 'Proactive competition policy and the role of the consumer' Speech on the European competition day, 29 April 2004, Dublin Castle, Dublin, European Commission – SPEECH/04/212 29/04/2004; See also Wouter P J Wils, *Efficiency and Justice in European antitrust enforcement* (Hart Publishing 2008), p.70.

²² Report on Competition Policy 2007, European Commission, (June 2008). The Annual Report reads 3,334 million euros in fines for year 2007, and 2,271 million euros for 2008, and still rising; Joaquín Almunia, 'Fighting against cartels: A priority for the present and for the future', speech in Brussels, 3 April 2014, SPEECH/14/281 03/04/2014; See David Burns, Joshua Hess and Geoffrey Weien, 'Criminal antitrust enforcement in 2008: A race to higher fines and longer jail terms' (2009) *Global Competition Review* 1, (in 2007, fines of \$630 million approximately, and in 2008, fines of \$686 million approximately were imposed by the US DoJ, and in the EU the Commission collected more than 3.3 billion euros in 2007, an 80 per cent increase from 2006 and an incredible 388 per cent increase from 2005).

²³ James M Griffin, 'The Modern Leniency Program after Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program' Speech at the American Bar Association Section of Antitrust Law Annual Meeting, San Francisco, California, 12 August 2003.

²⁴ Joaquín Almunia, 'Fighting against cartels: A priority for the present and for the future' Speech to SV Kartellrecht, Brussels, 3 April 2014.

²⁵ BIS, Ref: 12/512, Growth, competition and the competition regime: government response to consultation. 2012, para 7.39 at 75.

be due to the increased integration of markets in the EU, resulting in an increase in cartel activity within the EU countries, and also the increase in global market activity in the 1990s.

A research by Connor found that in the 2000s, the Antitrust Division of the US DoJ only had a cartel budget share of about 29 per cent,²⁶ and in terms of personnel, the Division grew only very slowly since 1990, and still below the authorised level in the late 1970s.²⁷ Despite the DoJ's claims that its corporate leniency programme has increased the detection rate of hard core cartels since the 1993 changes to the Leniency Program, the number of cases filed annually has actually fallen by about 60 per cent during 1990-2006.²⁸ Moreover, due to a considerable backlog of pending criminal cases, the disposal of cartel cases have fallen far below the levels publicly claimed by the DoJ. However, the financial penalties on conviction for price fixing have grown, in part due to legal upper limits.²⁹

A report released by the US Government Accountability Office (GAO) states as its main finding that the 2004 Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), has had little change in the number of wrongdoers applying for leniency.³⁰ The report found 78 leniency applications were submitted in the 6 years prior to ACPERA as against 81 in the 6 years after. They, however, found there was an increase in successful leniency applicants reporting previously unknown criminal conduct, and higher penalties in criminal cartel cases.

While the US DoJ imposes high fines, the volume of affected commerce by some of the suspected cartels is said to be over one billion dollars per year, and in some others over \$500 million per year and in more than half of the investigations, over \$100 million for the term of the conspiracy.³¹

According to an estimate by Bryant and Eckard, federal competition authorities are thought to detect only between 13 and 17 per cent of cartels in a given year.³² They based their finding on data reported for a large sample of DoJ cases. In the meantime, Bill Baer of the Antitrust Division of the US DoJ, has claimed that since January 2009, the Division has filed 339

²⁶ John M Connor, 'Anti-Cartel Enforcement by the DOJ: An Appraisal' (2008) 5 (1) *The Competition Law Review*, 89-121, p. 94.

²⁷ *Ibid*, p. 93.

²⁸ *Ibid*, p. 98.

²⁹ *Ibid*, p. 104.

³⁰ GAO, 'Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection' US Government Accountability Office Report to Congressional Committees, July 2011 < www.gao.gov/products/GAO-11-619 > last accessed 13.06.2016.

³¹ See Gary R Sprattling, 'International Cartels: The Intersection Between FCPA Violations and Antitrust Violations' Speech at American Conference Institute 7th National Conference on Foreign Corrupt Practices Act, Washington, D.C. December 1999.

³² See Peter G Bryant and Edwin W Eckard, 'Price Fixing: The Probability of Getting Caught' (1991) 73 (3) *The Review of Economics and Statistics*, 531-536.

criminal cases (presumably, 2009 to 2013), a more than 60 per cent increase over the previous five years.³³ Fines secured during the period was \$ 4.2 billion, with the money going into the Crime Victims' Fund. However, Baer says, 'Of course, we can never know for certain the full deterrent effect of our enforcement efforts. But we do know that self-reporting under our leniency program remains at high levels ...'³⁴

Meanwhile in the EU, concern was raised regarding the increase in the workload with 45 case handlers working in case teams of two, expecting a production capacity at its best to be around 10 decisions per year.³⁵ Guersent has pointed out that although cartels are high on the Commission's agenda, internal staffing decisions have to take account of competing priorities such as state aid and mergers, as well as non-cartel work, and basic functions of market surveillance including the detection of cartels, not reported through leniency or sector inquiries. He has emphasised that there is little prospect in the short term of a further sharp increase in the resources dedicated to anti-cartel enforcement, but warned cartelists not to feel a sense of security over these constraints.

The latest research by Wils shows that from 1996 to 2015, there were only 34 European Commission cartel decisions concerning cartels detected exclusively through leniency, where the cartel was clearly ongoing at the time of the first leniency application.³⁶ The report does not state the circumstances under which these applicants came forward to confess. There were 97 cartel decisions with fines during the same period,³⁷ thereby indicating a low number of Leniency applicants over a near 20-year period.

In the UK, the BIS has admitted that there is evidence that the UK typically brings a lower number of antitrust cases than many other regimes and that this is due to the burden on the competition authorities establishing and upholding a case.³⁸ If Leniency applicants provide the necessary information and evidence there need not be such a difficulty in upholding a case. Therefore, the question remains about the expected 'cooperation' given by the leniency applicants in order for the authorities to expedite and uphold cases.

³³ See Bill Baer, 'Reflections on Antitrust Enforcement in the Obama Administration', Speech to the New York Bar Association, 30 January 2014, New York.

³⁴ *Ibid*, p 3.

³⁵ See Olivier Guersent, 'The EU Model of Administrative Enforcement against Global Cartels: Evolving to Meet Challenges' in Claus-Dieter Ehlermann & Isabela Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, (Hart Publishing 2007).

³⁶ Wouter P J Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (2016) 39 (3) *World Competition: Law and Economics Review* 327-388, Table 2.

³⁷ *Ibid*, Table 1.

³⁸ BIS, **BIS/11/758**, A competition regime for growth: A consultation on options for reform – impact assessment, 2011, paras 203 and 206.

It is also a contributory factor in weakening enforcement that the authorities are acting as **investigator, prosecutor** and **decision maker** in investigations into cases of anticompetitive behaviour. However, ERA 13 has attempted to address this position by allocating two groups for case handling, namely, Senior Responsible Officer (SRO) to conduct the investigation, and a Case Decision Group to decide upon the investigation.³⁹ Both groups will be appointed from within the CMA. Any improved outcome can only be awaited in CMA investigations over a period of time.

There is also criticism that incidences of recidivism have not been dealt with severely enough in the enforcement of EU antitrust law, which raises the question of effectiveness of the financial penalties.⁴⁰ The fact that there is recidivism at all belies the claim that leniency programmes eliminate cartels. Relying heavily on cartel colluders to come forward under leniency policies may also open the possibility of exploitation of leniency programmes by cartelists.⁴¹ They could broaden their strategies to avoid detection, and only report in cases where detection is likely or an investigation has already started, while engaging in other separate cartel activity in different markets undetected. Under these circumstances, in the absence of sufficient good quality data, sound results of the actual success rate of the leniency programme would not be possible.

1.3 Aims and Objectives

The central hypothesis of this research is that the branch of public enforcement of competition law by the complementary means of Leniency is flawed, not only because leniency policy is not statutory but also because it weakens the full force of the law by rewarding the perpetrators. Moreover, it takes time away from interventionary investigations that the enforcement authorities are empowered to engage in. This study aims to identify the problems of depending on Leniency Programmes in detecting anticompetitive activities by businesses.

It must be emphasised at the outset that the UK competition law is in a much stronger position than that of the EU, in that it has criminalised cartel activity under section 188 of the EA 02, whereas EU law is essentially administrative only. Under EA 02 an individual convicted of a Chapter I offence can be imprisoned for a period up to 5 years and/or ordered to pay an

³⁹ CMA8, Guidance on the CMA's investigation procedures in Competition Act 1998 cases, 2014, sections 5 and 11.30.

⁴⁰ See Wouter P J Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35(1) *World Competition: Law and Economics Review* 1-24.

⁴¹ See John M Connor, 'Recidivism Revealed: Private International Cartels 1991-2009' (2010) *AAI Paper* 1-47.

unlimited fine. Once convicted, such an individual can also be disqualified from being a director of a given business or undertaking for up to 15 years.⁴² Although the large fines imposed by the EU have been likened to criminal fines by the European Court of Human Rights (ECtHR),⁴³ the EU has no criminal legislation to prosecute anticompetitive behaviour. However, both EU and UK competition laws have strong investigative powers which include intrusive surveillance and search of premises to seize documents relating to an investigation.⁴⁴ Therefore, these authorities are in a strong position to detect and deter cartels by means of ex officio investigations.

The UK competition law as it stands provides a wide range of powers for the regulators to exercise in the enforcement of civil investigations under CA 98. These powers are similar to the Commission's powers in the implementation of its civil investigations. They include the power to enter premises with a warrant, and enter and search premises without a warrant.⁴⁵ The entering of premises can be with or without notice.⁴⁶ Such powers can be exercised to seize documentary evidence which include electronically stored material pertaining to the offence under investigation. Further, the regulators also have the power to use covert or directed surveillance of persons and/or business premises to monitor their activities over a period of time to enable gathering further evidence.⁴⁷

The findings of this research reveal that colluders do not come forward willingly unless there is a threat of investigation looming.⁴⁸ Although in the past it may have been difficult to obtain evidence of secret dealings of cartels, the OFT cases reveal that colluders did leave behind large amounts of electronic evidence in almost all of the cases, along with other material evidence.⁴⁹ As such, hard evidence is not difficult to obtain as claimed by the enforcement

⁴² Company Directors Disqualification Act 1986, (s 9A); See OFT510, Competition disqualification orders, 1 June 2010.

⁴³ See *Engel and others v The Netherlands* [1976] ECHR 3; *Menarini Diagnostics v Italy*, No 43509/08, [38]-[42]; Case C-89/10 P *KME Germany and Others v Commission*, [133].

⁴⁴ See Sandra Marco Colino, *Competition Law of the EU and UK* (7th edn, OUP 2011); Cosmo Graham, *EU and UK Competition Law* (2nd edn, Longmans 2013); Barry Roger and Angus MacCulloch, *Competition Law and Policy in the EC and UK* (4th edn, Routledge-Cavendish 2008).

⁴⁵ Enterprise Act 2002, sections 192-194; See OFT guideline, '(OFT404) Powers of Investigation: Understanding competition law' 2004, Part 4 and Part 5; OFT1263rev, A guide to the OFT's investigations procedures in competition cases, October 2012, para 6.19; See also CMA8, Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases, March 2014, para 6.1.

⁴⁶ S 27(3) of CA 98; See OFT1263rev, (n 39), para 6.22; See also CMA8 (n 39), para 6.32.

⁴⁷ OFT515 – Criminal powers for investigating criminal cartels, 2004, Part 5.

⁴⁸ See Chapter 5.

⁴⁹ Ibid.

authorities. The OFT cases therefore form the core of this thesis, in revealing the hidden truth about the Leniency Programme in the enforcement of competition law.

This study also highlights the negative impact on victims, as a result of the adherence to leniency as a method of enforcement, by preventing the victims' access to much needed evidence if they wish to make a claim for compensation.⁵⁰ This is more so, as the Commission and the CJEU have both actively argued for the right of an individual for bringing an action for damages.⁵¹ Moreover, Council Regulation No 1/2003 intended national courts to deal with private actions for damages by victims,⁵² with a view to enhancing compliance of competition law by undertakings. Thus, the objectives of this thesis can be summarised as follows:

- a)** Disprove the claim that leniency is a more efficient method of detecting cartels than direct intervention by enforcement authorities in the enforcement of competition law,
- b)** Illustrate how leniency further negates the enforcement of competition law by being an obstruction to private actions by victims, and
- c)** Propose for a regulatory framework that could help improve economic governance, and lead towards easy detection of cartels, instead of relying on Leniency applicants.

1.4 Research Design

The chapters in this research are summarised below in order to give a concise map of the research:

Chapter Two lays out the framework of the applicable law in respect of anticompetitive behaviour as set out in Chapter I CA 98 and Article 101 TFEU, the EU law taking supremacy over its member states in respect of EU legislation. The competition law laid down therein relates to breaches which are essentially cartels. Cartels and/or 'hard core cartels' are discussed with reference to the harm they cause to competition in the market. This Chapter

⁵⁰ Commission, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

⁵¹ See C-453/99 *Courage v Crehen* [2001] ECR I-6297; See also Joined Cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-6619.

⁵² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, [2003] OJ L001/P001, para 7.

also examines briefly the goals of competition law and the historical approach in respect of leniency that has been carried forward to the present day, and why leniency policy is used in competition law cases. The detrimental effect on victims seeking damages due to leniency policy is dealt with briefly. The legislative bodies entrusted with enforcing competition law in the UK are also identified here. This Chapter also explores the reforms relevant to the offence of 'cartel' brought in by the new ERA 2013, by removing the 'dishonesty' element used in proving the breach.

Chapter Three is a review of the economic theories in relation to the application of leniency in cartel cases. Out of a large body of economic theories only a small cross section is reviewed. These theories or 'laboratory tests' called Stochastic Lemmas depict economic research which seek to establish the 'optimal' design of Leniency policies that are intended to detect and deter cartels. Economists have been the influence behind leniency programmes but their theories, although of value, vary significantly, partly due to the limitations on the availability of data.

Chapter Four explores the UK's principal enforcement authority, the OFT's (now CMA) fining procedure, in order to gain an understanding of how penalty decisions are arrived at by the OFT/CMA. The penalty Guidance explained therein is an essential feature in the OFT cases detailed in Chapter Five. The categories of Leniency available to prospective applicants are also briefly set out in this chapter.

Chapter Five is the core of this study which traces the OFT's cases published since CA 98 came into force until 2012, covering a 12-year period. The CMA which took over from the OFT in 2014 has taken over the OFT's pending cases, but apart from those, no significant independent Chapter I decisions have been taken by the CMA as at the close of this thesis. There are twenty-four Chapter I cases (two of which are only applications for clearance), which are reviewed in this chapter. Each case has been carefully summarised to ascertain the procedural steps taken in arriving at the decision. However, due to redaction of parts of the published version of these case records not all details pertaining to most of the companies involved are available. Soft law approach of Leniency is essentially an administrative tool, therefore, legal arguments, if any, are not dealt with in great detail relating to the case study.

Chapter Six critically analyses, and assesses the outcome of cases reviewed in chapter Five. The weakness in enforcement due to low penalties as opposed to gains made by colluders, and the need for stronger enforcement by way of criminal prosecutions are considered in this chapter. It is suggested that the proposals for making market structures open and transparent

by the finance sector are a better way for enforcement authorities to adopt in detecting concentrations in the market.

Chapter Seven will discuss the tension between the leniency programme, and private actions. This chapter critically analyses several decisions and developments which led to the Commission Directive on damages actions and the upholding of the confidentiality of Leniency documents. While the Commission has claimed that private actions would enhance, and take forward the enforcement of antitrust law, the Leniency policy appears to be an obstacle in obtaining vital evidence needed by victims in proving the harm caused to them.

Chapter Eight addresses the results of the study, and proposes possible solutions which aim to rectify, and remove the obstacles that prevent enforcement authorities in detecting and investigating anticompetitive behaviour in the market place. Some suggestions for future research are made at the close of this chapter.

1.5 Methodology

This work is crafted from a qualitative approach,⁵³ taking in the historical perspectives through to legal and administrative features of the use of leniency as a mode of public enforcement. The application of Leniency Programmes, emanating from the EU Leniency Notice,⁵⁴ is a feature of the administrative decisions of the enforcement authorities which are entrusted with the implementation of competition law. The question whether the Leniency Programme complements public enforcement of antitrust infringements, as postulated by its proponents could only be answered by carefully examining the extant primary and secondary sources of the law. The primary sources include the relevant legislative enactments, and published cases while secondary sources include texts written by experts within the subject area of Competition Law and Economics, as well as related areas that those authors and their texts refer to. The methodology used in this thesis, therefore, stands open and flexible, enabling the intended exploration, and discovery⁵⁵ of the logic behind the use of the phenomenon called the Leniency Programme, and in the collation of relevant material in each of the Chapters that follow. The texts included books, journals, articles, speeches, newspapers, magazines, and Working Papers by scholars in the field of antitrust law and economics.

⁵³ See Michael Quinn Patton, *Qualitative Research & Evaluation Methods*, (3rd edn, Sage Publications, 2002); Thomas A Schwandt, *The Sage Dictionary of Qualitative Inquiry* (3rd edn, Sage Publication, 2007).

⁵⁴ See n 7.

⁵⁵ See Juliet M Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (4th edn, Sage Publications, 2015).

For the purpose of this thesis, economic theories were of much assistance as leniency programmes have been promulgated by economists from the very outset.⁵⁶ Competition law is intrinsically linked to economics,⁵⁷ therefore review of economic texts and theoretical experiments in the subject was essential as illustrated in Chapter 3. Law and economics approach has been emerging as a dominant theoretical and scientific methodology for legal academia in the recent past leading to certain policy and law making.⁵⁸ It is argued by some, that law has become the most important areas of applied economics.⁵⁹ The economic methodology has, therefore, the advantage of easily crossing geographical borders and different legal systems, 'game theory' which developed the 'Prisoner's Dilemma' adopted in Leniency Programmes being one such example, among others.⁶⁰ The review of laboratory experiments by economists in Chapter 3 is descriptive in order to draw on the conclusions arrived at by their laboratory experiments in relation to leniency applied in competition law.

The British Library provided most of the texts, journals, articles and, the assistance in accessing material available online for developing and completing this thesis. The Brunel student registration helped access through JSTOR, to other university publications as well as journals published internationally, as did Westlaw and LexisNexis. The Institute of Advanced Legal Studies (IALS) of the London University held many useful lectures and seminars and also made available access to its library resources through registration. The lectures and panel discussions held by the Centre of European Law, Dickson Poon School of Law, King's College London brought well-known authors, and experts on European Law to the sessions that were well attended by both students and professionals. The World Wide Web, was instrumental in accessing the published cases, some of the Working Papers, speeches as well as archived articles such as news reports, and Press Releases by enforcement authorities. It also gave access to videos of presentations such as the ICN Leniency Programme, and some of the EU Officials' speeches. Seminars, Graduate School Learning Programmes, discussions with peers, and observations made in the work place as well as outside of it were great sources of assistance in collating the information gathered. The law Society Gazette was a source of

⁵⁶ See Louis Kaplow and Steven Shavell, 'Optimal Law Enforcement with Self-Reporting of Behaviour' (1994) 102 (3), *Journal of Political Economy*, 583-606; Steven Shavell, 'A Note on the Incentives to Reveal Information' (1989) 14 *Geneva Papers on Risk and Insurance* 66-74; Steven Shavell, 'Optimal Sanctions and the Incentive to Provide Evidence to Legal Tribunals' (1989) 9 (1) *International Review of Law and Economics* 3-11; Joseph Farrell, 'Voluntary Disclosure: Robustness of the Unraveling Result, and Comments on Its Importance' in Ronald Grieson (ed) *Antitrust and Regulation*, (Lexington Books 1986), 91-103; Paul Milgrom 'Good News and Bad News: Representation Theorems and Applications' (1981) 12 (2) *Bell Journal of Economics* 380-391.

⁵⁷ See Alexander Italianer, Opening address: 'The interplay between law and economics' Speech at Charles River Associates Annual Conference, Brussels, 8 December 2010.

⁵⁸ Eli M Salzberger, 'The Economic Analysis of Law: The Dominant Methodology for Legal Research?' (2008) 4 *Haifa Law Review* 207, p 208.

⁵⁹ Richard A Posner and Francesco Parisi (eds), *Law and Economics*, (Edward Elgar, 1997) p ix.

⁶⁰ See Martin J Osborne, *An Introduction to Game Theory* (OUP 2003).

constant update of changes in the law (in all areas) as well as affording the opportunity to attend organised events, some of which invited speakers from the European Union Competition Unit itself, so that questions could be asked directly for clarification of certain aspects of the subject under discussion. One seminar discussed a Commission proposal for shareholders to take responsibility to acquaint themselves with the type of investments their preferred companies were engaged in.⁶¹

Starting from a position of value-neutrality, (as a new comer to the subject of Competition Law) this work was carried out objectively, and the truth about 'Leniency' in competition law became apparent as a phenomenon deeply and inextricably embedded in the enforcement of competition law, with both the enforcers and the economists extolling its value in the detection of anticompetitive behaviour.⁶²

The qualitative methodology employed in this thesis involves a number of methods that are coming into play in the collation of relevant material and the construction of each of the Chapters that follow. They include descriptive, expository, and evaluative methods and critical analysis in the main.

In Chapter Two, descriptive method comes into play where it is aimed at providing a descriptive analysis of the technical and coordinated legal rules found in the primary sources.⁶³ The descriptive method is used here to collate, organise and describe legal rules and offer comments on the emergence and significance of the legal sources such as case law, with the aim of identifying the underlying system and the rules that are involved. By this process, the focus is on the primary sources; statutes, Directives, and case law in particular, and academic commentary as secondary sources. Chapter Three, deals with the economic theories of various economists. The method used here is expository,⁶⁴ which in other words is explanatory writing, providing information about hypotheses, theories and processes of various economists who have arrived at their conclusions using stochastic lemmas. These lemmas or mathematical equations are very elaborate and are not dealt with in this chapter. Only the resulting theories are reviewed in order to gain an insight into, and inform critically the strategies that convey how leniency plays out in a given scenario.

⁶¹ Panel Debate, 'Corporate Governance and Shareholders' Rights Directive', Panel Debate on 'Shareholders' Rights and Responsibilities?' with Zsolia Kerecsen, Policy Officer in the European Commission (Company Law and Corporate Governance) responsible for the revision of the Shareholders' Rights Directive, held on 14 November 2013 at the Law Society, Chancery Lane.

⁶² See n 23, n 24 and n 25.

⁶³ See Sherri L Jackson, *Research Methods and Statistics: A Critical Thinking Approach* (4th edn, Wadsworth 2012); See also Meredith D Gall, Joyce P Gall and Walter R Borg, *Educational Research: An Introduction*, (8th edn, Pearson, 2006).

⁶⁴ See Frances K Hubbard and Lauren Spencer, *Writing to Inform* (Rosen Publishing 2012).

Under Chapter Four, the UK policy and practice in relation to penalties in particular, are explained in order to enable an understanding of the decisions taken by the OFT in the cases set out in Chapter Five. For this purpose, the OFT's procedure involved in arriving at its penalty calculations in its Guidance, OFT 423,⁶⁵ is explored in this chapter.

Chapter Five is the core of this thesis, where all 24 Chapter I cases dealt with by the UK's principal enforcement authority over a period of 12 years are carefully examined, by way of content analysis⁶⁶ The descriptive and observational methods used in the study of these cases, is an examination of those cases in order to determine the truth of a stated claim rather than to draw out hidden or unknown factors. The cases are very lengthy with complicated, sometimes even convoluted procedural details, recording seemingly endless evidence from witnesses which were then analysed in great detail. It was therefore necessary to explore the OFT's procedure involved in arriving at its penalty calculations in its Guidance, explained in Chapter Four. The appeal tribunal CAT's involvement in some of the cases sheds more light on the complicity, if not complexity of the ways in which the participants of cartels conduct such activities. The CAT's decisions provide interesting material for analysis.

These cases are explanatory of the methods used by the enforcement authority in arriving at a decision on the breach of the extant law. As Goodson and Walker state, 'The task of research is to make sense of what we know'.⁶⁷ As such it should be treated as a review of the cases in order to achieve the aim of the research. i.e. to assess the efficiency of the Leniency Programme in detecting, and investigating anticompetitive behaviour by undertakings. Indeed, it has been said that innovation resides within a professional domain.⁶⁸ Decided cases provide ample opportunity for just such innovation, particularly in a local jurisdictional setting, in this case UK's competition enforcement authority. Leniency, however, is essentially an administrative tool and, therefore, does not test the limits of legal rules explicitly.

Chapter Six takes on the evaluation of the cases discussed in Chapter Five, using critical analysis to highlight certain aspects of the procedure adopted in the decisions. Critical analysis enables examining the similarities and differences between decisions and legal reasoning to glean new ideas by logical arguments.⁶⁹ Hence, while theory may apply in one case or

⁶⁵ OFT 423, OFT's guidance as to the appropriate amount of a penalty, 2012.

⁶⁶ See Alan Bryman, *Social Research Methods*, (4th edn, OUP 2012).

⁶⁷ Ivor F Goodson and R Walker, *Biography, Identity and Schooling: Episodes in Educational Research* (Falmer, London 1991) p. 107.

⁶⁸ See Jon Nixon, 'The teacher as researcher: contradictions and continuities' (1987) 64 *Peabody Journal of Education* 20.

⁶⁹ See Stella Cottrell, *Critical Thinking Skills: Developing Effective Analysis and Argument* (2nd edn, Palgrave Macmillan 2011); Jennifer Wilson Mulnix, 'Thinking Critically about Critical Thinking' (2012) 44 (5) *Educational*

instance it does not necessarily mean it can apply equally in all cases. It is only cautionary to assess theories, evidence and decisions in a logical and critical way in order to arrive at a balanced presentation. By questioning the set patterns, and not taking them at face value, allows the researcher to ascertain how a given situation could best be resolved. Chapter Seven addresses the issue of another aspect of enforcement hampered by leniency, i.e. private actions, where recent changes to the application of leniency are explored and analysed detailing relevant decisions. The concluding chapter draws on the findings of the thesis as set out in the preceding chapters by analysis and discussion, providing the implications of the results, leading to the conclusions aimed at by the thesis.

The methods employed in this thesis are not neatly demarcated but fluid, particularly as legal scholarship essentially deals with 'theories' while analysis of those theories could be very complex.⁷⁰ Legal theories in effect deal with practicalities, as demonstrated by the lengthy and arduous procedures taken by the OFT cases. It has been said that 'the core business of legal doctrine is interpretation' and, although, essentially it operates within geographical limits, legal doctrine can be defined as an 'empirical-hermeneutical discipline.'⁷¹ In that sense, it embraces the conception of an argumentative discipline, which uses argumentation to support legal interpretation or solution that is emphasised, rather than the interpretation itself.⁷² Thus, it is submitted that methodology in legal disciplines do not have to take a defined path in achieving the end result.

The OFT's life span came to an end with the establishment of the CMA which came into force on 1 April 2014, with the result that this thesis has to be read as relevant during the period the OFT was in force, whose website '<http://www.of.gov.uk>' is now closed. Thus this thesis had to deal with the changing environment, as the end of the OFT's term drew near and actually ended before the thesis was completed. With the closing of the OFT in 2014, the OFT cases, and its other publications have been archived, but they can be accessed via the new CMA website, '<http://www.gov.uk/cma>'. All pending investigations were transferred to the newly formed CMA. In addition to the change over from the OFT to the CMA, there were changes in the law and procedures, particularly by the new Consumer Rights Act 2015. Several of the sources which were easily available online related to OFT activities disappeared, with the

Philosophy and Theory 464-479; Peter A Facione and Noreen C Facione, *Thinking and Reasoning in Human Decision Making: The Method of Argument and Heuristic Analysis* (California Academic Press 2007).

⁷⁰ Robert Cryer and Tamara Hervey and others, *Research Methodologies in EU and International Law* (Hart Publishing, Oxford 2011), p 5.

⁷¹ Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013) p 3; See also Jaber F Gubrium and James A Holstein 'Analyzing Interpretive Practice' in N K Denzin and Y S Lincoln (eds) *Handbook of Qualitative Research* (2nd edn, Sage Publishing, 2000).

⁷² Ibid, Van Hoecke, p 4; See also Ronald Dworkin, *Law's Empire* (1st edn, Belknap Press of Harvard University Press 1986).

closure of the OFT. Changes with regard to the Leniency policy also came about in the EU, with the introduction of the Commission Directive on damages actions and non-disclosure of leniency documents.⁷³

Leniency as a topic is largely related to economic theory and research, but limited in that these researches are mostly around 'optimal' designs of leniency policy with limited data, as data on hidden cartels are not available.⁷⁴ In addition, there are few qualitative researches involving case studies or evaluation by interviews published in relation to Leniency, with this thesis encountering only two such published surveys, and the late discovery of a recent PhD thesis from Australia, on the effectiveness of the Australian immunity policy on cartel detection.⁷⁵ In particular, there were no comparative researches into the circumstances under which Leniency was sought by colluders, where the spontaneous or voluntary nature of the applicants coming forward could be observed.

⁷³ See n 50.

⁷⁴ See Chapter 3.

⁷⁵ OFT, OFT962 'The Deterrent Effect of Competition Enforcement by the OFT, Deloitte Report, 2007; See D Daniel Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 Antitrust Law Journal 201–240; See Pariz Lythgo-Marshall, 'The Australian Competition and Consumer Commission Immunity Policy for Cartel Conduct: A Critical Legal Analysis' 2016, Doctor of Philosophy thesis, University of Wollongong Thesis Collection 1954-2016 < <http://ro.uow.edu.au/theses/4636> last accessed 26.08.2016.

CHAPTER 2

Leniency Programme as a Complementary Public Enforcement Strategy in the EU and the UK Competition Law

2.1 Introduction

The central focus of this thesis is on the area of Leniency Programmes as applied in the enforcement of competition law. The purpose of this chapter is to identify the rules applicable to anticompetitive behaviour under EU and UK competition law as both these jurisdictions work together in order to deter such anticompetitive behaviour, with the EU law taking supremacy over UK competition law. This chapter will examine the different aspects of the law that come into play under Chapter I, CA 98, which is modelled on Article 101 of the Treaty on the Functioning of the European Union (TFEU). Both EU and UK regulations have embraced the concept of leniency by introducing Leniency Programmes into their respective competition law regimes as a method of complementary public enforcement.⁷⁶ Although there are some differences with regard to different Member States that have adopted a leniency policy in respect of the enforcement of EU competition law, the basic principles are common to all of them as EU law takes primacy over its Member States.⁷⁷ Effects of the EU's attempt at promoting private actions, in order to enhance enforcement of competition law under decentralization are also perused. This chapter will discuss the nature of cartels as well as the use of leniency in arresting deviant behaviour from a historical point of view.

The UK's enforcement authorities, and some of the new changes brought about by the ERRA 13 are set out briefly, the biggest changes being the replacement of the principal enforcement authority, the OFT, by the CMA, and re-defining of the cartel offence itself with the removal of

⁷⁶ Alexander Italianer, 'Fighting cartels in Europe and the US: Different Systems, Common Goals' Speech at the International Bar Association, Boston, 9 October 2013; Ali Nickpay, 'UK cartel enforcement – past, present, future' Speech to the Law Society Anti-Trust Section, 11 December 2012, p 6.

⁷⁷ See Case 6/64 *Costa v ENEL* [1964] ECR 585; Alexander Italianer, 'Completing Convergence' Speech at the European Competition Day, Rome, 10 October 2014; See also Alexander Italianer 'The Independence of National Competition Authorities' Speech at the Competition Conference – Best Practice in Investigations, Austria, 12 Dec 2014.

the 'dishonesty' requirement from it. Essentially, this chapter explains the legal framework within which cartels are dealt with under competition law, and why cartels are undesirable and difficult to detect, which has led the enforcement authorities to apply a leniency programme.

2.2 Legislative Instruments

In the UK, Chapter I of the Competition Act 1998 (CA 98), prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition unless an exemption from the prohibition applies.⁷⁸ Further, the Enterprise Act 2002 (EA 02) along with the new ERRA 13 make it a criminal offence to engage in such anticompetitive activities.⁷⁹ The CA 98 prohibitions are modelled upon those contained in Articles 101 of the TFEU.⁸⁰ Where the effect of anticompetitive behaviour extends beyond the UK to other EU member states, UK competition authorities, and the courts are also empowered to apply and enforce the entirety of Articles 101. For the purpose of this thesis, only anticompetitive activities under Chapter I of CA 98 (as amended by EA 02), and Article 101 of the TFEU apply.

Article 101(1) of the TFEU prohibits agreements between undertakings that have as their object or effect to prevent, restrict or distort competition between the Member States.⁸¹ 'Object' and 'effect' must be taken separately as they are not cumulative, but constitute alternative requirements. Thus, where an agreement has as its object, to restrict or distort competition⁸² it is not necessary to analyse its effects. If the object does not appear so to restrict competition, then it must be considered whether that agreement affects competition.⁸³ Under Article 101(2)

⁷⁸ The meaning of "agreement or concerted practice" is to be determined in accordance with s 60 of CA 98, in a manner consistent with the decisions of the CJEU, GC and the Commission under Article 81 (1) EC (now Art 101(1)); *JJB Sports plc and Allsports Ltd v Office of Fair Trading*, [2004] CAT 17, para 150; Case 48/69, *ICI v Commission (Dyestuffs)*, [1972] ECR 619, [64-66]; Case 47/73, *Suiker Unie v Commission* [1975] ECR 1663, [283].

⁷⁹ However, criminal prosecution is the least used provision by the UK enforcement authorities.

⁸⁰ Arts 101 and 102 (ex Art 81 and 82) are the main competition law provisions contained in the TFEU. Both Articles 101 and 102 TFEU are enforceable in parallel with Chapters I and II of CA 98. Article 102 (ex Art 82) prohibits conduct which amounts to abusive behaviour by a dominant undertaking in a relevant market. It may be useful to note here the evolution of Arts 101 and 102 which were Articles 81 and 82 prior to the Lisbon Treaty of 2009, and they were Articles 85 and 86 respectively before the entry into force of the Amsterdam Treaty in 1999; Case 6/72 *Continental Can v Commission* [1973] ECR 215, [11], The ECJ stated that 'Articles 85 and 86 seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the common market.'; See also Stephen Weatherill, *Cases & Materials on EU Law*, (10th edn, OUP 2012).

⁸¹ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, [249].

⁸² Case C-501/06 *P GlaxoSmithKline v Commission* [2009] ECR I-9291, [59]; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, [28]; Case 209/07 *Competition Authority v Beef Industry* [2008] ECR I-8637, [15] [16].

⁸³ See Case 56/65 *STM v Maschinenbau* [1996] ECR 235; Case T-328/03 *O2 (Germany) GmbH v Commission* [2006] ECR II-1231; See also Damien Geradin and Ianis Girgenson, 'The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach' 2011 < <http://ssrn.com/abstract=1970917> > last accessed 15.08.2016.

all such agreements that come under Article 101(1) are void.⁸⁴ However, Article 101(3) exempts agreements under Article 101(1) provided certain conditions are met.

2.2.1 Modernisation and Decentralisation Aimed at Restitution of Victims?

Until the modernisation Regulation 1/2003 replaced the centralised enforcement system set up by the previous Regulation (EEC) No. 17/62, only the Commission could award an individual exemption under what was then Article 81(3), now Article 101(3).⁸⁵ Regulations (EEC) 19/65 and 2821/71 empowered the Commission to issue block exemptions under Article 81(3) to certain categories of agreements.⁸⁶ It was meant to ensure that the then Articles 81 and 82 (now Art 101 and 102) were applied effectively and uniformly across Member States. However, the centralised scheme was found to hamper the application of competition rules by the competition authorities and the courts. This was mainly due to the fact that the Commission was overloaded by administrative work and the centralised enforcement of competition law, leading to an increasingly inefficient way of enforcement procedure in a Community (now European Union) currently consisting of 28 Member States.⁸⁷

Further, the lack of uniformity in the enforcement of competition law in the Member States was another motivation for adopting a centralised system to ensure consistency and coherence.⁸⁸ Regulation 1/2003 was therefore brought in to replace the centralised system with a directly applicable exemption scheme whereby the national competition authorities (NCAs) and the national courts of the Member States were empowered to apply Article 101(3).⁸⁹ This brought in decentralisation, together with the already existing power of direct effect of Articles 101 and

⁸⁴ It should be noted however, that the presence of an anticompetitive term in a contract does not necessarily invalidate the whole agreement, as decided both by the ECJ in Case 56/65 *Société Technique Minière v Maschinenbau* [1966] ECR 235, and by the English court in *Chemidus Wavin Ltd v Société pour la Transformation* [1977] FSR 181 (CA); [1978] 3 CMLR 514; See also *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; The English courts' practice is the severing of the illegal provisions from otherwise lawful agreements; Richard Whish, *Competition Law*, (5th ed), LexisNexis, London 2003) p. 289.

⁸⁵ Council Regulation (EEC) No 17 of 6 February 1962, First Regulation Implementing Article 85 and 86 of the Treaty (Articles 81 and 82 after the Treaty of Amsterdam) [1962] OJ L13/204; Pursuant to Article 9(1) of Regulation 17, only the European Commission could grant an individual exemption under Article 81(3).

⁸⁶ Council Regulation (EEC) No 19/65 of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1965] OJ 36/533. See Council Regulation (EC) No 1215/1999 of 10 June 1999 amending Regulation No 19/65 [1999] OJ L148/1; Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices [1971] OJ L285/46. The Regulation was last amended by the Act of Accession of 1994.

⁸⁷ Recital 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1; See 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' Commission Programme No 99/027 COM (1999) 101 final [1999] OJ C132/1.

⁸⁸ See Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1; See also *Procureur de la République v Giry and Guerlain* [1980] ECR 2327.

⁸⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, [2003] OJ L001/P001, which replaced Regulation 17 of 1962. Consequently, the UK's OFT adopted its 'Modernisation, (December 2004): The OFT's application of EC Regulation 1/2003 and the United Kingdom legal exception regime.'

102, as has been decided by the CJEU in its case law.⁹⁰ The removal of the centralised block exemptions under Article 101 (3), which hampered private actions was meant to enable, to a greater extent, those individuals harmed by the anticompetitive behaviour of companies, to seek damages.⁹¹ Nevertheless, decentralisation though necessary, is found to be an insufficient tool to promote private enforcement. Regulation 1/2003 did not dramatically change the outlook for more private actions.⁹²

2.2.2 Supremacy of the EU Law Safeguarded under s 60 of CA 98

In applying Chapter I, CA 98 and Article 101 TFEU, the OFT/CMA and the national courts are bound by the fundamental principle of supremacy of the European law (Union law) and must follow the case law of the CJEU in interpreting EU legislation. The rule was first laid down in *Costa*, and confirmed in subsequent cases.⁹³

Under Article 16(2) of the Modernisation Regulation 1/2003, where the Commission has taken a decision on an agreement or conduct under Article 101 or Article 102, NCAs cannot take a decision in respect of the same agreement or conduct which would run counter to the decision taken by the Commission.⁹⁴ This position has been incorporated in section 60 of the UK's CA 98. Hence UK authorities are under a dual obligation in dealing with questions arising from competition law within the UK. First, they must ensure that there is no inconsistency with either the principles laid down by the EU Treaty and the CJEU, or any relevant decision of the CJEU.⁹⁵ Second, the UK authorities must have regard to any 'relevant decision or statement' of the Commission that has the authority of the Commission as a whole, as for example individual cases under Articles 101 and 102, Commission Notices, and policy statements published in its Annual Reports on Competition Policy.⁹⁶ The governing principle, therefore, is that UK law should not deviate from EU law in its substantive application.

⁹⁰ Case 127/73 *BRT v SABAM* [1974] ECR 51; Case C-282/95 *P Guérin Automobiles v Commission* [1997] ECR 1-1503; Case C-453/99 *Courage v Crehan* [2001] ECR 1-6297.

⁹¹ *Ibid*, *Courage*.

⁹² Ashurst: 'Study on the conditions of claims for damages in case of infringement of EC competition rules' Comparative Report, 2004, (Prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan).

⁹³ See Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 26/62 *Van Gend en Loos* [1963] ECE 1, 13; *R v Secretary of State for Transport, ex p. Factortame Ltd* [1989] 2 All ER 629; 2 WLR 997; See *McCarthy's Ltd v Smith* [1981] QB 199; See also *Garland v British Rail Engineering* [1982] 2 All ER 402.

⁹⁴ Competition Law Modernisation: OFT 442, (2004), p 9.

⁹⁵ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, Official Journal C101 27/04 (2004); Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, [2003] OJ L001/P001.

⁹⁶ See Case *Thoburn v Sunderland City Council* [2002] EWHC 195; 3 WLR 247; 1 CMLR 50; Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; See also Case 106/77 *Simmenthal* [1978] ECR 629; Joined Cases C-6/90 and C-9/90, *Francovich and others v Italy*; 26/62 *Van Gend en Loos v Netherland* [1963] ECE 1.

The *acquis communautaire* applies to core policies, but in other areas Member States may choose to participate or act.⁹⁷ The CJEU has recognised in a consistent line of judgements, though very rarely by name, the ‘procedural, remedial and institutional autonomy’ of the Member States to identify the remedies, courts and procedures that are necessary for the exercise of Union law rights at the national level.⁹⁸ Also CJEU has imposed demanding Union law limits and safeguards upon that autonomy, on principles of ‘equality and effectiveness’.⁹⁹

The obligation to ensure consistency applies only to the extent that this is possible, having regard to any relevant differences between the provisions concerned.¹⁰⁰ Consistency, it may be said, is a by-product of the general EU principles of ‘effectiveness and equivalence’, which in competition law has developed in a specific manner, not only as a policy objective but as a true requirement on issues such as the ability of competition authorities to defend their decisions before review courts and the method of calculation of penalties.¹⁰¹

Union law at national level should not be submitted to more onerous procedures than the enforcement of comparable national law. The second principle which is a direct consequence of the principles of ‘direct effect and supremacy’ is a much harder test, i.e. it must be effective and must not render the remedies impossible or onerous. To these must be added Article 267, TFEU preliminary reference procedure, paramount to a private enforcement. The CJEU has proceeded further, for example, in *Francovich*¹⁰² and *Factortame*,¹⁰³ it recognised certain autonomous Community law remedies for Community Law¹⁰⁴ based rights, and has delegated to national law only the very specific conditions for their exercise as well as the procedural framework rules within equality and effectiveness.¹⁰⁵

⁹⁷ See Stephen Weatherill, *Cases and Materials on EU Law*, (10th edn, OUP 2012), p 626.

⁹⁸ Assimakis P Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, 2008), p 147; Indeed, the ECJ did not hold in Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, that national courts must always consider themselves bound by Commission decisions, but only indirectly through the Court of Justice’s intervention, to which they can always have access by means of the preliminary reference procedure.

⁹⁹ *Ibid*; Case 130/79 *Express Dairy Foods Ltd v Intervention Board for Agricultural Produce* (1980) ECR 1887, [12].

¹⁰⁰ See Komninos, (n 98).

¹⁰¹ Commission Staff Working Document, Enhancing competition enforcement by the Member States’ competition authorities: Institutional and procedural issues. Accompanying the document, Communication from the Commission to the European Parliament and the Council: Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives {COM(2014) 453} {SWD(2014)230}, paras 9,10,11 and 62 respectively.

¹⁰² See Case C-6/90 *Francovich v Italy* [1991] ECR I-5357.

¹⁰³ See Case C-213/89 *Factortame Ltd v Secretary of State for Transport* [1990] ECR I-2433; See also Joined cases C-46/93 and C-48/93 *Brasserie du Pecheur SA and Factortame Ltd* [1996] ECR I-1029; See Case 6/64 *Costa v ENEL* [1964] ECR 585; cf. *Macarthys Ltd v Smith* [1981] QB 180 – Lord Denning MR.

¹⁰⁴ ‘Community Law’ is now referred to as ‘Union Law’ since the Lisbon Treaty of 1 December 2009, and will be referred to as such except when quoting past cases and texts; See Weatherill, (n 97), p 3.

¹⁰⁵ See Komninos, (n 98), p 148.

A key difference between CA 98 and EU rules is that CA 98 has no requirement of an effect on inter-state trade. This is significant as the unstated objective behind much of EU law is the achievement of a single market.¹⁰⁶

2.2.3 What are the Goals of Competition Law?

The goals of Article 101 TFEU are not clearly stated.¹⁰⁷ However, the pronouncements of enforcement authorities suggest that competition law is intended, essentially, to ensure consumer welfare.¹⁰⁸ A Commission report states that ‘maximising consumer welfare’ should be considered in its competition policy.¹⁰⁹ Under Article 101(3) TFEU, in particular, one of four cumulative conditions that should be met for exemption is that consumers must receive a fair share of the resulting benefits.¹¹⁰ The concept of fair share indicates that the benefits must at least compensate consumers for any harm caused by the efficiencies generated by the anticompetitive agreement. Passing on benefits to consumers by way of distribution of the gains can take the form of improved or new products or lower prices. According to BIS, ‘It (competition) ultimately benefits consumers through greater choice, better quality and lower

¹⁰⁶ Core goal of the Treaty of Rome, 1957; See John McCormick, *European Union Politics* (Palgrave Macmillan 2011) p 75; See also Council Recommendation [C(95)130/FINAL] which states that ‘anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries’.

¹⁰⁷ The Treaty of Rome, signed in 1957, formed what is now known as the European Union (EU). The primary goal of EU competition policy was to enable a common market within the EU by eliminating obstacles pertaining to member state borders. The Treaty of Rome also created what is now called the Court of Justice of the European Union (CJEU), formerly the European Court of Justice (ECJ), as the official court to interpret the Treaty on questions of EU law. CJEU decisions applying Article 101 reflect interpretation in light of the EU’s goal of market integration. However, over the decades, the CJEU has taken a much broader approach to interpreting Article 101; Case C-501/6 P, C-513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [63]; Rein Wesseling, *The Modernisation of EC Antitrust Law*. (Oxford, Hart Publishing 2000), p. 48-49.

¹⁰⁸ Alexander Italianer, ‘Competition Policy for Consumers’ and Citizens’ Welfare’ speech on European Competition and Consumer Day, Dublin, 24 May 2013; Philip Lowe, ‘Consumer Welfare and Efficiency - New Guiding Principles of Competition Policy?’ speech at 13th International Conference on Competition and 14th European Competition Day, Munich, 27 March 2007.

¹⁰⁹ Commission, ‘Report on Competition Policy 2008’ COM (2009), {SEC(2009) 10004} COM(2009) 374 final, para 108 at 27; Roger D Blair and D Daniel Sokol, ‘Welfare Standards in US and EU Antitrust Enforcement’ (2013) 81 *Fordham L Rev* 2497, pp 2510-11.

¹¹⁰ Commission, Communication of the Commission, Notice, Guidelines on the application of Article 101(3) of the Treaty, (2004/C 101/08), OJ C 101 , 27/04/2004 P. 0097 - 0118; Under Article 101 (3), prohibitions under Art 101 will not apply to any agreements, decisions or concerted practices between undertakings, ‘which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’ OJ 115, 09/05/2008 P. 0088 – 0089.

prices.¹¹¹ However, only objective benefits are to be considered as providing consumer welfare.¹¹²

Whish and Bailey identify several policy goals and are of the view that governments use competition policy to further a variety of objectives, stating, ‘... competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally.’¹¹³ Over the years, The CJEU decisions have widened to include the protection of the ‘structure of the market, and in so doing competition as such’ as seen in *GlaxoSmithKline*,¹¹⁴ and has moved away from purely a consumer welfare paradigm in *T-Mobile*.¹¹⁵

Neelie Kroes has said, ‘Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources’.¹¹⁶

According to Lianos, ‘... the EU courts have moved to a more pragmatic view of the objective of market integration and have employed reasoning that may be compatible with a welfare perspective.’¹¹⁷ In the meantime, European Parliament Fact Sheets inform that from the point of view of the EU competition policy objectives, ‘It is a condition for achieving a free and dynamic internal market and is one of several instruments promoting general economic welfare’.¹¹⁸

In the UK, in accordance with section 25(3) of ERA 1998, ‘The CMA must seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers.’ In a Command Paper published in 2001, the UK’s Department of Trade and Industry has stated,

¹¹¹ BIS, **Ref: BIS/12/644**, ‘A Competition Regime for Growth: A Consultation on Options for Reform, Impact Assessment’ 2012, para 1 at 10.

¹¹² See n 110, paras 20-23 (Guidelines); Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, [349].

¹¹³ Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012), p 20.

¹¹⁴ Case C-501/06P, *GlaxoSmithKline Services Unlimited v Commission* [2010] 4 CMLR 2 [63].

¹¹⁵ Case C-8/08, *T-Mobile Netherlands BV v Raad* [2009] 5 CMLR 11 [43].

¹¹⁶ See Neelie Kroes, ‘European Competition Policy – Delivering Better Markets and Better Choices’ **SPEECH/05/512**.

¹¹⁷ Ioannis Lianos, ‘Some reflections on the question of the goals of EU Competition Law’ (2013) *CLES Working Paper Series* 3/2013, p 14.

¹¹⁸ See Stephanie Honnefelder and Roberto Silvestri, ‘Fact Sheets on the European Union: Competition Policy’ (2017) *European Parliament* < http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_3.2.1.html > last accessed 04.07.2017; See also ‘European Union Competition Law: The Goal (or Goals) of Article 101’ *New York Law School* <http://www.eucomplaw.com/the-case/goals/> last accessed 04.07.2017.

‘Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production.’¹¹⁹ Thus, the preservation of competition appears to be the basis for the Chapter I prohibitions, with the consumers benefiting as a result.

‘Consumer welfare’ is not universally accepted as the intended goal of competition law.¹²⁰ One argument is that the term should be ‘consumer surplus’¹²¹ and some economists believe the appropriate description should be ‘total surplus’ or ‘aggregate welfare’.¹²² ‘Consumer surplus’ refers to the perceived welfare of buyers in a particular market, while ‘total surplus’ or ‘aggregate welfare’ refers to the perceived welfare of both buyers and sellers in a given market.¹²³ Therefore, total surplus disregards wealth transfer between consumers and sellers.

Economists argue that antitrust law cannot maximise consumer welfare. ‘The antitrust methodology focuses on one market; although conceptually it may maximise consumer surplus or total surplus, it cannot maximise consumer welfare ...’¹²⁴ These arguments go against the consumer welfare theory first put forward by Bork,¹²⁵ and accepted by the US Supreme Court,¹²⁶ leading to an intense debate among economists.¹²⁷ Economists recognised the term as allocative efficiency which they interpret as ‘social welfare’. Yet, economists do not view social welfare as a basis for antitrust analysis. They argue that the ultimate standard by which anticompetitive practices should be judged is their effect on

¹¹⁹ DTI, ‘A World Class Competition Regime’ Cm 5233 (2001), para 1.1 <<https://www.gov.uk/government/publications/a-world-class-competition-regime>> last accessed 07.07.2016.

¹²⁰ Barak Orbach, ‘How Antitrust Lost its Goal’ (2013) 81 (5) *Fordham Law Review*, 2253, p 2255; Roger D Blair and D Daniel Sokol, ‘Welfare Standards in US and EU Antitrust Enforcement’ (2013) 81 *Fordham L. Rev.* 2497, p.2504; Herbert Hovenkamp ‘Distributive Justice and Consumer Welfare in Antitrust’ (2011), p 6. <<https://ssrn.com/abstract=1873463>> last accessed 03.08.2016.

¹²¹ Barak Orbach, ‘The Antitrust Consumer Welfare Paradox’ (2011) 7 (1) *Journal of Competition Law & Economics*, 133 -164, p. 137; Dennis W Carlton, ‘Does Antitrust Need to be Modernized?’ (2007) 21 (3) *Journal of Economic Perspectives* 155 -176, p. 157; See also Jerry A. Hausman, ‘Exact Consumer’s Surplus and Deadweight Loss’ (1981) 71 *Am Econ Rev*, 662.

¹²² Ibid, Orbach, (n 121); Dennis W Carlton, pp 156 and 157.

¹²³ See Orbach, (n 121), p 138.

¹²⁴ See Orbach, (n 121), p 140.

¹²⁵ Robert Bork, ‘The Goals of Antitrust Policy’ (1967) 57 *Am Econ Rev* 242; Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (1st edn, Free Press 1993), p 427.

¹²⁶ *Reiter v. Sonotone Corp*, 442 US 330 (1979), at 343; *Arizona v. Maricopa County Med. Soc’y*, 457 US 332 (1982), at 367; *NCAA v. Bd. of Regents of Univ of Okla*, 468 US 85 (1984), at 107; See also *Leegin Creative Leather Prods Inc v PSKS Inc*, 127 S. Ct. 2705 (2007), at 2713.

¹²⁷ See Orbach, (n 120); Louis Kaplow, ‘On the Choice of Welfare Standards in Competition Law’ (2011), *Harvard Law, Economics and Business Discussion Paper No. 693*, (05/2011) pp. 1 and 2; N Gregory Mankiw, *Principles of Economics* (7th edn, Cengage Learning 2014), p 135.

competition and not on consumer welfare.¹²⁸ However, according to Hammer, ‘Antitrust law is not a forum to test the limits of economic theory. The theory must fit in an appropriate doctrinal setting and it must be administrable within the context of litigation, which is predicated upon a system of lay factfinders.’¹²⁹ Hammer opines, ‘total welfare’ should be advanced as a defence in antitrust cases.¹³⁰

Despite the on-going controversy on the goals of competition by economists, and certain decisions embracing wider issues by the CJEU itself,¹³¹ EU enforcers emphasise on the ‘consumer welfare’ paradigm.¹³² Further, in a report prepared by the ICN, it is noted that of the 57 authorities in different jurisdictions who responded to the ICN questionnaire, only one country did not refer to consumer welfare in its mission statement, legislation, or the goal of its Authority.¹³³

Although relevant arguments contribute towards clarity and refinement of the law, these arguments do little to help in the actual enforcement of competition policy which is meant to deter cartels. For markets to function properly and efficiently it is anticompetitive behaviour that needs to be eliminated and the focus must be on achieving that end if a market economy is to be maintained. CJEU decisions indicate that the court weighs circumstances surrounding each case in order to ascertain whether the alleged abuse has distorted competition within the internal market rather than the welfare of the consumer.¹³⁴ The UK cartel decisions follow a similar assessment to those in the EU cases, in arriving at a finding, as seen in the cases discussed in Chapter 5 of this thesis.

The rationale, however, is that if there is no distortion, the market runs efficiently, providing good quality products and services which in turn benefit consumers. Whish and Bailey have

¹²⁸ See Renata Hesse, ‘And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement’ speech at Global Antitrust Enforcement Symposium, 2016, Washington DC; See also *United States v. Microsoft Corp.*, 253 F.3d 34, 60 (D.C. Cir. 2001).

¹²⁹ Peter J Hammer, ‘Antitrust Beyond Competition: Market Failures, Total Welfare and the Challenge of Intramarket Second-Best Tradeoffs’ (2000) 98 *Mich L Rev* 849, p9 00.

¹³⁰ *Ibid*, p 851.

¹³¹ See Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline v Commission* [2009] ECR I-9291, [63]; Case C-8/08, *T-Mobile v Commission*, [2009] ECR I-04529, [38]-[39].

¹³² See n 108.

¹³³ ICN, Competition Enforcement and Consumer Welfare: Setting the Agenda, 10th Annual Conference, May 17-20, 2011, The Hague <<http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf>> p. 16. Last accessed 31.07.2016.

¹³⁴ Case C-6/72 *Continental Can v Commission* [1973] ECR 215, [12]; Case C-85/76 *Hoffmann La Roche v Commission* [1979] ECR 462, [91]; Case C-95/04 P, *British Airways plc v Commission* [2007] ECR. I-2331, [106] [107]; Case C-8/08, *T-Mobile Netherlands v Raad* [2009] ECR I-4529, [38]-[39]; Cases C-468/06 to C-478/06, *Sot. Lelos kai Sia EE and others v GlaxoSmithKline* [2008] ECR I-7139, [68]; Case C-501/6 P, C-513/06 P, C-515/06 P, and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, [63]; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB* [2011] I-527, [24]; Case T-461/07, *Visa Europe and Visa International Service v Commission* [2011] ECR II-1729, [126]; Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II-3619 [867].

said, 'A related benefit of competition is that it may have the dynamic effect of stimulating innovation as competitors strive to produce new and better products for consumers.'¹³⁵ Therefore, active detection and deterrence of cartel formation is central to the enforcement of competition law. There is also the need to focus on the economic assessment of the infringements concerned, and evaluate whether such infringements have caused harm to consumers or not. A method to establish the damage caused that can be applied consistently would greatly reduce the time involved in investigations. Economic experiments may assist in realising such an analytical measurement to the advancement of competition enforcement. In order to deter collusion, the fines imposed must reflect the harm caused.

2.2.4 What is a Cartel / Hard Core Cartel?

A cartel is an association of two or more legally independent entities that explicitly agree to coordinate their prices or output for the purpose of increasing their collective profits.¹³⁶ The OFT describes a cartel in its simplest terms as, 'an agreement between businesses not to compete with each other.'¹³⁷ Article 101(1) TFEU and section 2 (2) of CA 98 set out examples of agreements, decisions or practices that constitute cartel practices, which involve price-fixing, market sharing, bid rigging or limiting the supply or production of goods or services.

The EU definition of cartels is, 'Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits.'¹³⁸ Further, the Glossary of Terms states that 'Cartels are harmful to consumers and society as a whole due to the fact that the participating companies charge higher prices (and earn higher profits) than in a competitive market.'¹³⁹

In *Cityhook*,¹⁴⁰ the UK's Competition Appeal Tribunal has said that the term 'hard-core' is used to refer to the most serious object-based prohibitions of Article 101 TFEU, and Chapter I CA 98. The Organisation for Economic Co-operation and Development (OECD), states that 'Hard core cartels are anticompetitive agreements by competitors to fix prices, restrict output, submit

¹³⁵ Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012) p 4.

¹³⁶ John M Connor, "Our Customers are Our Enemies": The Lysine Cartel of 1992-1995' (2001) 18 *Review of Industrial Organisation* 5-21, p 6.

¹³⁷ OFT, 'Cartels and the Competition Act 1998: A guide for purchasers' (2005) p.3.

¹³⁸ European Commission, *Glossary of Terms used in EU Competition Policy: Antitrust and control of concentrations* (2002), p 8.

¹³⁹ *Ibid.*

¹⁴⁰ *Cityhook Ltd v OFT* [2007] CAT 18, para 255.

collusive tenders, or divide or share markets.’¹⁴¹ The terms ‘cartel’ and ‘hard core cartel’ are thus interchangeable.

2.3 Why Cartels are Harmful

Cartels negate competition and are therefore considered to be ‘the most serious violations of competition law.’¹⁴² An agreement that forms a cartel need not be in writing and could be verbal or even a tacit conspiracy. Being illegal, cartels mainly operate in secret, using various means to conceal their existence, as revealed in the *Lysine*¹⁴³ cartel where the senior most executives fabricated aliases and front organizations to hide their activities. Experience of the US Antitrust Division with cartels has shown that cartels often use extreme measures to conceal their existence. The Division uncovered cover-ups ranging from; creating bogus trade associations, using code names to conceal evidence, and sophisticated ruses to keep evidence out of reach of the law, wholesale destruction of incriminating documents, witness tampering, and even hiding incriminating evidence in the attic of a cartel member’s grandparent’s home.¹⁴⁴ These revelations were mostly from the *Lysine* cartel, which raised lysine prices 70 per cent within their first nine months of collusion.¹⁴⁵

Thus, cartels between undertakings (businesses) operate in order to achieve greater profits and with less effort, which could result in harm to consumers, and to the economy in general. The effect of cartel activity is to defeat the State’s attempt to allow free and undistorted markets which bring benefits to the consumers by keeping the prices down, improving the quality of products and services.¹⁴⁶ By their very nature cartelists depend on one another’s agreed

¹⁴¹ OECD, ‘Hard Core Cartels’ (2000), p 6.

¹⁴² See OECD, ‘Cartels and anti-competitive agreements’ (2017).

¹⁴³ See Scott D Hammond, ‘Caught in the Act: Inside an International Cartel’ Address before OECD Competition Committee Public Prosecutors Program, 2005, Paris, France; See also Case COMP/36.545/F3 – *Amino Acids*, OJ L 152/24-72, 7.6.2001.

¹⁴⁴ Scott D Hammond, ‘Beating cartels at their own game – sharing information in the fight against cartels’ Speech presented at the Competition Policy Research Centre, Fair Trade Commission of Japan, “How Should Competition Policy Transform Itself? – Designing the New Competition Policy”, Tokyo, 20 November 2003; James M Griffin, ‘The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division’s Criminal Enforcement Program’ Speech at the Annual Meeting of the American Bar Association section of Antitrust Law, 12 August 2003; Scott D Hammond, “Caught in the Act: Inside an International Cartel” Speech at the OECD Competition Committee Working Party No. 3, Public Prosecutors Program, OECD Paris, 18 October 2005; Thomas O Barnett, ‘Seven Steps to Better Cartel Enforcement’ Presentation at the 11th Annual Competition Law & Policy Workshop, European Union Institute, Florence, 2 June 2006.

¹⁴⁵ *Amino Acid Lysine Antitrust Litigation*, MDL No.1083 (DCNI); See Hammond S D, “Caught in the Act: Inside an International Cartel”, Presentation at the OECD Competition Committee Working Party No.3, Public Prosecutors Program, OECD, 18 October 2005, Paris; John M Connor, ‘Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation 1996’ (2009) AAI < <http://ssrn.com/abstract=1408070> > last accessed 05.07.2016.

¹⁴⁶ Richard Whish and David Bailey, *Competition Law*, (Oxford University Press 2012), p 19.

course of action which reduces their incentives to produce new or better products and services at competitive prices.¹⁴⁷

Existence of cartels means the abuse of market power so that consumers have less choice and pay more for the affected products or services, more than the competitive price. This results in the transfer of benefits from the consumer to the producers by way of profits, and inefficient allocation of resources which is a loss to the society in general referred to as the 'deadweight loss' in economic terms (see Fig. 1, below).¹⁴⁸

Deadweight Loss

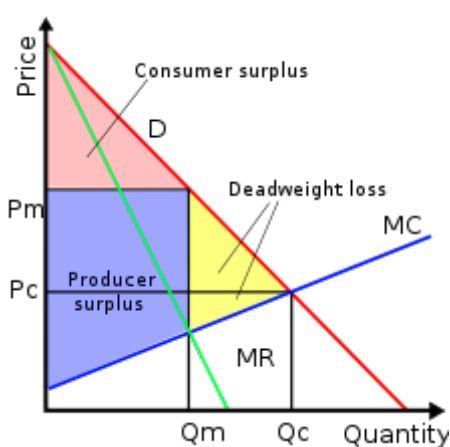


Figure 1

When consumers move away from purchasing goods and services if they feel the price is not justified compared to their expected utility, it affects trade, reducing the level of trade leading to a reduction of overall welfare within a society.

The former Commissioner Kroes has said:

'[C]artels are always changing shape – adapting like viruses to fight our attempts to kill them off. Always building up resistance, always trying to outsmart us. Our investigations show that cartels try to cover their tracks using encrypted e-mail,

¹⁴⁷ See Commission, 'Competition, Cartels: Overview' < <http://ec.europa.eu/competition/cartels/overview/> > last accessed 05.09.2017.

¹⁴⁸ Wikimedia, 'File: Monopoly-surpluses.svg' *Wikimedia Commons, the free media repository*; See also 'How to Calculate Deadweight Loss' < <https://www.youtube.com/watch?v=kF1c8ujpTYY> > last accessed 06.11.2017; Yoon-Ho Alex Lee, 'Competition, Consumer Welfare, and the Social Cost of Monopoly' (2006), Student Scholarship Papers, *Yale Law School*, Paper 19, p 25 < http://digitalcommons.law.yale.edu/student_papers/19 > last accessed 06.11.2017.

attributing code names, using fake or misleading e-mail accounts, pre-paid mobile phones ... it is a long list of deceptions. Today's fight is nothing new – cartels have plagued capitalism since industrialisation began. From the 'conspiracies to raise prices' noted by Adam Smith and onwards, cartelists have had a long time to perfect their tactics.'¹⁴⁹

Cartels have also been compared to "theft" or "cancer" by other prominent competition law authorities.¹⁵⁰

Cartels are not a new phenomenon. Adam Smith, philosopher and one of the earliest economic writers known, has referred to cartel activity by employers of his time. In his book *The Wealth of Nations* written in 1776, he wrote that masters (employers), who wield the power, combine to sink the wages of labour even below the actual rate: 'These are always conducted with the utmost silence and secrecy till the moment of execution: and when the workmen yield, as they sometimes do without resistance, though severely felt by them they are never heard of by other people.'¹⁵¹ Adam Smith's well-known quote from *The Wealth of Nations* is, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."¹⁵²

The UK has a long history of the use of the doctrine of restraint of trade where the founding precedent is identified as the *Dyer's Case* in 1414.¹⁵³ The doctrine, though of limited scope in economic theory, has provided a basis for the courts to reconcile the freedom to trade with the freedom to contract.¹⁵⁴ It is believed the US antitrust laws were influenced by this doctrine,¹⁵⁵ particularly by the Statute of Monopolies of 1624 which allowed triple damages and double legal costs to victims harmed by an unlawful monopoly.

More recently, in the UK, in the House of Lords debate on CA 98 Bill, Lord Lucas has said that 'the more concentrated the market is, the more likely it is that the firms will be able successfully

¹⁴⁹ Neelie Kroes, "Tackling Cartels – A Never-ending Task" Commission's press release, SPEECH/09/454, 8 October 2009.

¹⁵⁰ Donald Slater, Sebastien Thomas and Denis Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?' *GCLC Working Paper* 04/08, 1-46, pp.14 and 15.

¹⁵¹ Adam Smith, 'An Inquiry into the Nature and Causes of The Wealth of Nations' in Jim Manis (ed), *Electronic Classics Series Publication*, 2005, p 60 < www2.hn.psu.edu/faculty/jmanis/adam-smith/Wealth-Nations.pdf > last accessed 15.11.2017.

¹⁵² Ibid, Smith, p 111.

¹⁵³ *Dyer's Case* (1414) 2 Hen. 5. 5 Pl; See John Dyson Heydon, *The Restraint of Trade Doctrine*, (3rd edn, Butterworths, 2008); Michael J Trebilock, *The Common Law of Restraint of Trade: A Legal and Economics Analysis*, (Carswell, Toronto 1986).

¹⁵⁴ *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, [180], Diplock LJ.

¹⁵⁵ Sec 1, Sherman Act 1890; *Apex Hosiery* (US 1940); *Hopkins v. United States* (US 1898); See also Jonathan D C Turner, 'The Need for an Effective Competition Policy' (1984) 6 *European Intellectual Property Review* 331.

to agree to dampen or restrict competition.¹⁵⁶ Some authors have defined a cartel as ‘an explicit arrangement designed to eliminate competition.’¹⁵⁷

2.3.1 Detection of Cartels by means of Leniency Programmes

Despite the availability of stringent regulations, enforcement authorities have found it difficult to detect and investigate cartel activities due to the secretive nature of such anticompetitive behaviour,¹⁵⁸ resulting in poor enforcement records, according to a study by Ashurst.¹⁵⁹ With a view to overcome or at least reduce the difficulties surrounding the uncovering of cartels, the EU introduced a leniency programme by a Leniency Notice into the enforcement of EU Competition Law (following the US example) in 1996.¹⁶⁰ The Leniency Notice was later revised on two occasions, in 2002 and the last in 2006.¹⁶¹ The UK adopted its own version of leniency policy, helped by the decentralisation Regulation 1/2003 which enabled National Competition Authorities (NCAs) of the Member States to frame their own rules in accordance with EC law. Nevertheless, some scholars have found the detection rate of cartels in the EU to be in the range of 12.9 per cent to 13.2 per cent, in a given year.¹⁶²

The Leniency Programme was expected to encourage firms engaged in cartel activity to come forward and confess to the enforcement authority, providing information and evidence for a successful investigation in return for which the infringing company will receive immunity (or amnesty) from sanctions. In addition, the leniency applicant is given full confidentiality in respect of all the evidence supplied under the leniency agreement.¹⁶³ By granting leniency, the expectation was that companies would come forward with more and more revelations of

¹⁵⁶ Lord Lucas, HL Deb, 30 October 1997, Col. 1161.

¹⁵⁷ David L Kaserman and John Mayo, *Government and Business: The economics of antitrust and regulation* (Dryden Press, 1995), p 152.

¹⁵⁸ Richard Whish and David Bailey, *Competition Law*, (7th edn, OUP, 2012), p.513; DTI, White Paper, ‘A World Class Competition Regime’ Cm. 5233 (The Stationery Office, London 2001), paras 7.7 and 7.8.

¹⁵⁹ Ashurst: ‘Study on the conditions of claims for damages in case of infringement of EC competition rules’ Comparative Report, 2004, (Prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan); UK’s National Audit Office (NAO) also criticised OFT in its report, ‘NAO review of the OFT’s competition enforcement work, 17 November 2005’.

¹⁶⁰ European Commission, Commission Notice on the non-imposition or reduction of fines in cartel cases, [1996] OJ C207/4-6, (1996 Leniency Notice).

¹⁶¹ Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17; See IP/06/1705 and MEMO/06/469, December 7, 2006; See also Sari Suurnakki and M. Tieno Centella, ‘Commission adopts revised Leniency Notice to reward companies that report hard-core cartels’ (2007) No.1, EC Competition Policy Newsletter 5-15.

¹⁶² Emmanuel Combe, Constance Monnier and Renaud Legal, ‘Cartels: The Probability of Getting Caught in the European Union’ 2008, Cahiers de Recherche PRISM-Sorbonne / CR-07-01-03, p 21 < <https://ssrn.com/abstract=1015061> > last accessed 19.07.2016.

¹⁶³ Confidentiality – Article 12 of Regulation 1/2003 – corporate statements made under the Notice will only be transmitted to NCAs, provided that conditions in the Network Notice are met, and provided the level of protection against disclosure is equivalent to that of the Commission. Consequently, in the UK the EA 02 introduced sections 47A and 47B to the CA98.

anticompetitive activities, prompting enforcement authorities to investigate, and bring convictions more quickly. This was also meant to make it possible for victims harmed by those activities to bring private damages claims, by way of follow-on actions.

2.3.2 Leniency and Confidentiality

Under European antitrust policy, confidentiality is granted to leniency applications and business secrets provided under such applications by companies involved in antitrust breaches. Regulation 1049/2001 provides for confidentiality in principle, and under Article 339 TFEU leniency documents are confidential on the notion of 'professional secrecy'.¹⁶⁴ This position was further strengthened by a 'Resolution of the Meeting of Heads of European Competition Authorities of 23 May 2012'.¹⁶⁵ Finally, the Commission Directive of 2014 has made it clear that information provided in Leniency applications must never be disclosed.¹⁶⁶ For the protection of confidentiality, leniency applicants are able to give oral evidence brought in by Article 32 of the revised Leniency Notice of 2006. Such statements may be archived, and access will only be granted to an addressee of the Statement of Objections, and such addressee or his counsel cannot make copies, either mechanical or electronic, of that evidence. This is a problematic area for complainants who are not permitted access to such evidence by Article 33 of the 2006 Leniency Notice. Hence, confidentiality granted to leniency applicants can be a hindrance to victims harmed by the activities of those companies thereby restricting claimants accessing the very documents that could help them bring successful actions.

There are also at least three areas of procedural safeguards with varying degrees of protection afforded by member states namely; legal privilege, the right against self-incrimination, and the principle of inviolability of the home.¹⁶⁷ These issues may come into play when the

¹⁶⁴ See Antonio Caruso, 'Leniency Programs and Protection of confidentiality: The experience of the European Commission' (2010) 1(6) *Journal of European Competition Law & Practice* 454-477.

¹⁶⁵ ECN resolution on protection of leniency material in the context of civil damages actions (23 May 2012). This resolution came about as a direct result of the ECJ decision in *Pfleiderer*. See Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161.

¹⁶⁶ Commission, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance. OJ L 349, 5.12.2014, 1-19.

¹⁶⁷ These are fundamental human rights recognised by the European Court of Human Rights (ECtHR) which form a part of the right to privacy guaranteed by Article 8 of the Convention. Article 6 and 13 of ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms) signed in Rome on 4 November 1950. The constitutional traditions common to Member States, that of principle of effective judicial protection is recognised in EU law; Case 222/84 *Johnston* [1986] ECR 1651, [18]-[19]; Case C-432/05 *Unibet* [2007] ECR I-2271, [37]. Although not a signatory to the ECHR the Commission has adopted the Charter of Fundamental Rights which in essence reflects those rights - Art 47 of the Charter of Fundamental Rights of the European Union, proclaimed in

Commission or the NCAs conduct inspection of premises which they can conduct with or without notice to the undertakings concerned.¹⁶⁸ The enforcement authorities can conduct ‘dawn raids’ as well for such inspections.¹⁶⁹ In two recent cases, the GC has ruled that the Commission must delimit their inspection to the subject matter under investigation.¹⁷⁰ The Court also ruled that an aggrieved party in respect of the seizure of unrelated documents (“seize and sift”) may appeal only after the final Commission decision of the investigation concerned. In March 2013, the Commission revised its guidance on dawn raids to include electronic data as well.¹⁷¹

2.3.3 Leniency Programme: The Rationale

Leniency Programme is open to those businesses who come forward and reveal to an enforcement authority their participation in cartel activity, and provide evidence and cooperate fully with the ensuing investigation.¹⁷² The first such business to come forward can expect to be rewarded with full immunity from prosecution and/or fine. Those who apply subsequently may also be eligible, not for full immunity but on a sliding scale of 50 per cent to 20 per cent reduction in fines, according to the level of ‘value added’ evidence and cooperation given to the investigating enforcement authority. The eligible parties will be given full confidentiality to any evidence provided to the authority in their investigation. However, no party who has engaged in coercing another to take part in the illegal activity will be eligible for leniency. Nevertheless, this rule has not been followed up strictly in the UK since the leniency policy revision in 2002.¹⁷³

The concept behind leniency is not new and has been used historically, mainly in war situations. Julius Caesar used a divide and rule strategy to weaken tribal unity by striking deals

Nice on 7 December 2000 (OJ 2000 C 364), and again in Strasbourg on 12 December 2007 (OJ 2007 C 303); See also UK’s CMA8, Guidance on the CMA’s investigation procedures in Competition Act 1998 cases, 2014, paras 7.1 and 7.4.

¹⁶⁸ S 27 CA 98 provides for inspection without warrant with notice, while s 28 CA 98 provides for inspection with a warrant of suspected premises by the OFT/CMA.

¹⁶⁹ See T-402/13, *Orange v Commission*, [2014] ECR 991; cf. Case C-583/13, *Deutsche Bahn and Others v Commission* [2015] ECR 404; see also the opinion of Advocate General Nils Wahl issued on February 2015.

¹⁷⁰ Case T-135/09 *Nexans v Commission* [2012] ECR 596, [64]; See Case T-140/09 *Prysmian v Commission* [2012] ECR 597; See also Philip Bently, and Philipp Werner (with contribution from Gerald McElwee) ‘European Commission Dawn Raids: EU General Court Reins in “Fishing Expeditions”’ *National Law Review*, (McDermott Will & Emery 2012).

¹⁷¹ EC, Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003 (the revised note) of 18 March 2013; See Andrea L Hamilton and David Henry, ‘Seizure of Electronic Data: European Commission Dawn Raid Inspection Guidance Revised’ (2013) *National Law Review*, (McDermott Will & Emery 2013).

¹⁷² EC Leniency Notice, Notice on Immunity from fines and Reduction of Fines, paras 8, 9 and 11 (which outline the information an applicant must proffer); OFT 803, OFT 1495, July 2013.

¹⁷³ In the OFT cases examined in this paper, apparently no coercers have been identified, although a few instigators were identified, some of whom were granted leniency.

with some of them, his motto being *Divide et Impera*.¹⁷⁴ The same strategy was in use and still used in more recent and current situations in dealing with not only in war but also in many other spheres including breaking up of organised crime.

Such strategic behaviour has been applied in recent history through microeconomic analysis to legal problems. Von Neumann and Oskar Morgenstern¹⁷⁵ are considered to be the founding fathers of both non-cooperative and cooperative game theory by using mathematical models.¹⁷⁶ The Game Theory developed into the operation of a particular branch of economic theory, the 'Nash Equilibrium'.¹⁷⁷ Casting the prisoner as always one step ahead of the cop, reward of lenient treatment in exchange for information to facilitate prosecution is a common practice in many countries. Thus, if two prisoners were to be interrogated separately, they will respond according to the likely payoff, (See Fig. 2, below).¹⁷⁸

The prisoner's dilemma

		Prisoner B	
		Confess	Keep quiet
Prisoner A	Confess	Both go to jail for ten years	Prisoner B gets life imprisonment, A goes free
	Keep quiet	Prisoner A gets life imprisonment, B goes free	Both go to jail for one year

Economist.com

Figure 2. - Prisoner's Dilemma payoff matrix

¹⁷⁴ Giancarlo Spagnolo, 'Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime' (2003) *CEPR*, 1-37.

¹⁷⁵ John von Neumann and Oskar Morgenstern, *Theory of games and economic behaviour*, (Princeton University Press, 2007).

¹⁷⁶ Harold W Kuhn and Albert W Tucker, 'John von Neumann's Work in the Theory of Games and Mathematical Economics' Part 2 (1958) 64 (3) *Bull Amer Math Soc* 100-122.

¹⁷⁷ See John F Nash, 'Equilibrium Points in n-Person Games' (1950) 36 *Proc. Nat. Acad. Sci USA*, 48-49; See also Martin J Osborne, *An Introduction to Game Theory* (1st edn. OUP 2003).

¹⁷⁸ The Economist, 'Game theory: Prison breakthrough' < <https://www.economist.com/news/economics-brief/21705308> > last accessed 27.12.2017; See also Christopher R Leslie, Amnesty, Game Theory, and Cartel Stability, (2006) 31 *Journal of Corporation Law* 453-488, Table 1.

The strategy will be for each prisoner to confess, since that would minimize the average length of time in prison for both.

In order to obtain the information necessary for effective investigation and prosecution, a leniency policy was first introduced in the US in 1978 (later revised, in 1993), whereby informants would be granted leniency if they confess or reveal the existence of their illegal activities to the US Antitrust Division of the DoJ, but essentially, they were precluded from amnesty if the Antitrust Division had already begun an investigation into the suspected cartel.¹⁷⁹ By the revised leniency programme in 1993,¹⁸⁰ full immunity would be granted only to the first to confess before an investigation has begun by the DoJ, and cooperate in the investigation, but did not automatically preclude leniency to others who came forward after the investigation had begun, allowing leniency on a sliding scale to those who reveal themselves subsequently, depending on any additional information and cooperation they provide in that investigation.

Following on from the US experience, a Leniency Programme was first introduced into European Competition Law in 1996,¹⁸¹ but its introduction did not lead to a rush of applicants as expected. The policy was then revised in 2002¹⁸² and again in 2006,¹⁸³ to increase incentives for companies to self-report, following the revision in the US Leniency policy, which resulted in uncovering a greater number of cartels, according to the US DoJ Antitrust Division. Deputy Assistant Attorney General, Gerald F Masoudi claimed that the DoJ's leniency policy 'The greatest single driver of our success ... is our Corporate Leniency Program.'¹⁸⁴ Similarly, Gary R Spratling has said in a speech that in the US, the Corporate Leniency Policy has been the most effective generator of cartel cases and is believed to be the most successful program in US history for detecting large commercial crimes.¹⁸⁵

Meanwhile, in Europe, similar praise has been attributed to the EU Leniency Programme. Deputy Head of Unit for the Cartels Directorate of the Commission, Sari Suurnakki noted that

¹⁷⁹ See US DoJ, 'Leniency Program (1978)'; Leniency Program of the US Department of Justice, Antitrust Division, 2010.

¹⁸⁰ Corporate Leniency Policy (1993), US DoJ, Antitrust Division; See also Christopher Mason, *The Art of the Steal: Inside the Sotheby's-Christie's Auction House Scandal*, (Berkley Publishing Corp. 2005), p. 250-251.

¹⁸¹ European Commission, Commission Notice on the non-imposition or reduction of fines in cartel cases, [1996] O.J. C207/4 (1996 Leniency Notice) – 1996 Leniency Notice only offered a reduction in fines to cartel participants who disclosed the existence and details of cartel activity in which they were involved.

¹⁸² Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2002] O J C45/3-5. It lacked transparency and predictability of outcome to companies seeking leniency.

¹⁸³ Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] O J C298/17. This introduced the marker system, clarified the requisite evidential threshold, and provided confidentiality and non-disclosure clauses to applicants.

¹⁸⁴ Gerald F Masoudi, 'Cartel Enforcement in the United States (And Beyond)', speech delivered at the Cartel Conference in Budapest, Hungary, 16 February 2007, sec III.

¹⁸⁵ Gary R Spratling, 'Detection and Deterrence: Rewarding Informants for Reporting Violations' (2001) 69 (5) GEO WASH L REV 798-823, p 799.

the five-year period from 2005 to 2009 saw three times the number of cartel cases as the equivalent five-year period a decade before.¹⁸⁶

UK has adopted its own Leniency policy, as have other Member States of the EU (except Malta)¹⁸⁷ independently of one another, but in accordance with the EU regulations. The principle of applying Leniency by different enforcement authorities in cartel cases is the same in different jurisdictions, while there are certain operational and punishment differences. Varying antitrust regimes and different leniency policies have resulted in some uncertainty as to which NCA, a business operating in a number of EU countries wishing to make an application should choose. In this situation, it can only be expected that a canny infringer would select the jurisdiction that would be most advantageous for him, or 'forum shopping' to apply as the first mover in order to obtain full immunity.

The presence of different models in the EU Member States has raised problems for applicants who have engaged in businesses across a number of Member States, and, therefore, having to apply to the NCAs of each of those jurisdictions, in order to avoid prosecution in multiple jurisdictions as well as by the Commission.¹⁸⁸ However, where parallel actions are instituted, a member state or other member states may stay proceedings until a decision is made by another member state or may agree to allow one member state to proceed with the action.¹⁸⁹ If the Commission itself has taken an action against a cartel, member states will not take parallel action against that cartel.¹⁹⁰

2.3.4 The New Cartel Offence under ERRA 2013

Under the new Enterprise and Regulatory Reform Act 2013, which came into force on 1 April 2014, the UK cartel offence will be redefined in a number of significant ways. A major change is the removal of the element of 'dishonesty' so that the prosecution no longer needs to prove that the defendant acted dishonestly in entering into the cartel under investigation. This removes the '*Ghosh*' test that the prosecutors have had to prove in the past, that the defendant dishonestly entered into the cartel agreement in question.¹⁹¹ The proposal to remove the

¹⁸⁶ Christopher R Leslie, 'Editorial - Antitrust Leniency Programmes' (2011) 7(2) *Competition Law Review* 175-179.

¹⁸⁷ See n 9.

¹⁸⁸ Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, [41]; Opinion of A-G in *Boehringer v European Commission*, paras 3-6.

¹⁸⁹ See Case C-344/98 *Masterfoods Ltd* [2000] ECR I-11369. Article 13 of the Council Regulation applies when parallel authorities act on the same issue,

¹⁹⁰ See Case 48/72 *SA Brasserie de Haecht* [1973] ECR 77, where the ECJ defined the concept as the initiation of a procedure within the meaning of Article 9 of Regulation No 17 which implies an authoritative act of the Commission, evidencing its intention of taking a decision.

¹⁹¹ *R v Ghosh* [1982] 3 WLR 110; [1982] EWCA Crim 2; [1982] QB 1053; [1982] 2 All ER 689.

'dishonesty' element in proving a cartel was on the grounds, inter alia, that it 'introduces significant lack of certainty ...',¹⁹² and that 'criticism of the *Ghosh* test has persisted and intensified in the field of cartels ...'.¹⁹³ This may be a change for the good, considering that cartels by definition, 'have as their object the prevention, restriction or distortion of competition and therefore neither the (Leniency) applicant nor the OFT will be required to assess the actual effect of the cartel activity before proceeding with the application.'¹⁹⁴ It must be noted, however, that the CMA has brought a prosecution initiated by the OFT against three individuals in which one has pleaded guilty, and two others were acquitted following trial by jury.¹⁹⁵ The case was brought under the old regulations (carried over from the OFT) showing that the old rules could have been effective had the Enforcement Authority so wished.¹⁹⁶

A second change is the introduction of Section 188A, which sets out additional circumstances, under which no cartel activity is deemed to have taken place.¹⁹⁷ Under ERRA 13, therefore, no cartel offence would be committed where; a) the defendant's customers are given 'relevant' information about the agreement before they purchase the product or service, b) in bid-rigging arrangements, the person requesting bids is given 'relevant' information, about the arrangements at or before the time when a bid is made, or c) in any case 'relevant information' about the (cartel) agreement is published, before it is implemented, in the manner specified at the time of the making of the agreement in an order made by the Secretary of State.

Such information will include the names of the undertakings concerned, the product or service, and a description of the nature of the agreement. This change may go a little way to open up and introduce transparency to company agreements, although how the companies will handle their future agreements in view of these changes are yet to be seen.

The changes, however, do not stop here. Section 47 of the ERRA 13 also provides three new defences to cartel colluders. First, that the defendant did not intend to conceal the nature of the agreement from customers at all times, before entering into an agreement for the supply of the product or service to them. Second, the defendant did not intend to conceal the nature of the agreement from the CMA, and third, that the defendant took reasonable steps to ensure

¹⁹² BIS/11/657, 'A Competition Regime for Growth: A consultation on options for reform' Department for Business, Innovation and Skills, March 2011, para 6.12.

¹⁹³ *Ibid*, para 6.14.

¹⁹⁴ OFT's detailed guidance on principles and process, (2013), para 2.2

¹⁹⁵ This is after a lapse of six years since OFT's attempt at prosecuting three British Airways executives collapsed.

¹⁹⁶ CMA Case Reference: CE/9623/12. A parallel civil investigation for cartel activity regarding the same matter was settled, CMA Case Reference: CE/9691/12, *Supply of galvanised steel tanks for water storage*, 2014.

¹⁹⁷ S 188 EA 02, revision in s 47 ERRA 2013, (now 188A and 188B).

that the nature of the agreement was disclosed to professional legal advisers for the purpose of obtaining legal advice prior to implementation.¹⁹⁸

The first and the second defences are not controversial in that defendants would normally tend to put forward those arguments anyway, as evident from some of the cases investigated by the OFT, discussed in the succeeding Chapter Five of this work. Therefore, there should have to be guidelines in order to avoid cartelists wriggling out of their responsibility by devious methods.

The third defence stipulated has no strong basis, as it may be that the defendant totally disregarded the legal advice given or even worse, where the legal adviser never responded to the request in the first place.¹⁹⁹ It is also possible that both lawyer and client may plead legal privilege. Moreover, the legal adviser is not likely to be asked to give evidence in the case, all of which raise the question as to why this third defence is stipulated. A much better defence would have been if the defendant company had a rigorous compliance programme which the defendants pleaded they tried to observe at all times.

2.4 Private Enforcement as a Necessary Adjunct to Public Enforcement of Competition Law?

One of the important objectives of the Modernisation and Decentralisation Regulation 1/2003 was to pave the way for more private competition law enforcement. The CJEU has held in *Courage*²⁰⁰ that the full effectiveness of Article 101 would be at risk if it were not open for a victim of anti-competitive behaviour in proceedings before a national court to claim damages for any loss suffered by that victim, which was deemed to have resulted from that anticompetitive behaviour, either by way of a contract or by conduct liable to restrict or distort competition. Following the reform, private litigants were expected to play a pivotal role in aiding the enforcement of Articles 101 (and 102) by bringing private actions for damages for harm caused by competition law infringements.²⁰¹ The European Commission considers such private enforcement as a useful and necessary adjunct to the enforcement activities of the

¹⁹⁸ See CMA, Cartel Offence Prosecution Guidance (CMA9), 2014, para 2.7; See also Peter Whelan, 'Section 47 of the Enterprise and Regulatory Reform Act 2013: A Flawed Reform of the UK Cartel Offence' (2015) 78(3) *Modern Law Review* 493.

¹⁹⁹ 'Law Society's Competition Section Annual Conference' hosted by the Law Society on 16 May 2013, Stephen Blake (Senior Director of the OFT Cartels & Criminal Enforcement Group) confirmed that in reference to the 'legal advice defence' and subject to the publication of prosecutorial guidance, all that is required is that advice is sought, no matter whether it is received or acted upon; Ali Nickpay, 'UK cartel enforcement – past, present, future' Speech to the Law Society Anti-Trust Section, 11 December 2012, p 27.

²⁰⁰ See Case C-453/99 *Courage v Crehan* [2001] ECR I-6297; Joined Cases C-264/01, C-306/01, C-354/01 and 355/01 *AOK Bundesverband v Ichthyol-Gesellschaft* [2004] I-2493.

²⁰¹ Recital 7 of Regulation 1/2003; See Case C-213/89 *R v Secretary of State, ex p. Factortame* [1990] ECR I-2433; Joined Cases C-6 and 9/90 *Francovich v Italy* [1991] ECR I-5357; Case C-5/94 *R v Minister of Agriculture, Fisheries and Food, ex p. Hedley Lomas (Ireland)* [1996] ECR I-2553; Case C 128/92 *H. J. Banks v British Coal Corporation* [1994] ECR I-1209.

Commission and the NCAs.²⁰² Enhancement of private actions was expected to maximise enforcement by way of a complementary measure to public enforcement.²⁰³ Private antitrust actions can arise in a number of ways, such as from franchise agreements,²⁰⁴ licensing agreements,²⁰⁵ distribution agreements,²⁰⁶ and partial function joint ventures.²⁰⁷ The Commission has stressed that national courts have an important role to play in the enforcement of EC Competition law, *inter alia*, by emphasising the advantages of complainants bringing private actions so as to direct more 'claims' to the courts.²⁰⁸ These could be, for example, by way of damages, legal costs and/or interim measures.

In 2005, The Commission published a Green Paper and an accompanying Commission Staff Working Paper on Damages actions for breach of the EC antitrust rules.²⁰⁹ The Commission Staff Working Paper noted that 'Articles 81 and 82 EC create directly effective obligations on, and rights for, individuals. The principle of direct effect means that individuals can assert these rights and enforce these obligations directly before a court in a Member State ...' Further, it states that 'In order to ensure the 'effectiveness' (*effet utile*) of directly applicable Community law rights, national courts must provide adequate remedies for their protection.' The UK Government responded to the Green Paper expressing its support for 'the wider aim of the paper, namely to encourage and facilitate private damages actions to those (consumers and businesses) who have suffered loss due to infringement of competition rules'.²¹⁰ The Commission published its White Paper in 2008 with the aim of identifying the appropriate

²⁰² Case 253/00 *Munoz v Frumar* [2002] ECR I-7289 [58] Opinion of AG Geelhoed; See also Commission (EC) Staff Working Paper SEC 2005 1732, paras 13-15.

²⁰³ Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper, Damages actions for breach of the EC antitrust rules {COM(2005) 672 final}, paras 5 and 13; See Case 26/62 *Van Gend en Loos* [1963] ECE 1.

²⁰⁴ See Case 161/84 *Pronuptia* [1986] ECR 353.

²⁰⁵ See Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055.

²⁰⁶ See Case 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 266.

²⁰⁷ See Case COMP/37.730 *Re The Agreement between Deutsche Lufthansa AG and Austrian Airlines* OJ [2002] L242/25; [2003] 4 CMLR 252.

²⁰⁸ Commission (EC) Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C101/65, para16.

²⁰⁹ Commission (EC) 'Damages actions for breach of EC antitrust rules' (Green Paper) COM (2005) 672 final. See <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>. SEC (2005) 1732 Commission Staff Working Paper, Annex to the Green Paper, Damages actions for breach of the EC antitrust rules {COM (2005) 672 final}. See also subsequent Commission White Paper on Damages actions for breach of the EC antitrust rules, Commission Press Release IP/08/515 and MEMO/08/216.

²¹⁰ See OFT's 'Private actions in competition law: effective redress for consumers and business – recommendations' November 2007, OFT916resp. < gov.uk/file28534.pdf > last accessed 08.01.2015.

incentives for private antitrust damages claims,²¹¹ which resulted in the Commission issuing a Directive²¹² on antitrust damages actions signed into law on 26 November 2014.

Private actions remain the least forthcoming effect of competition law, both in the EU and the UK. According to Ashurst findings, this is mainly due to the 'lack of clarity, either because what the legal basis actually is for such claims is unclear or because the interaction between the specific legal basis and general provisions on conditions for liability is unclear.'²¹³

The UK's new Consumer Rights Act 2015 has introduced an 'opt-out' system subject to certain conditions, in the hope of boosting private actions, the results of which can only be observed in the future. Claimants can choose between the existing 'opt-in' or the new 'opt-out' system. There will be no exemplary damages awarded to victims under the new regulations.

2.4.1 Private Enforcement and Leniency: Problems for Victims

Once a company has been granted leniency for coming forward and providing evidence of its anticompetitive activities, all the evidence provided under that leniency agreement will remain confidential, so that no third party can have access to it.²¹⁴ Further, the defendant companies are provided confidentiality over their business secrets. Thus a victim who wishes to bring an action for damages may be unable to prove her case without access to that vital evidence. In *CDC Hydrogene Peroxide* the General Court of the European Union, annulled the Commission's refusal to grant a damages claimant access to the contents list of the Commission's file regarding the hydrogen peroxide cartel.²¹⁵ Indeed, in that case the General Court noted that leniency programmes are not the sole way of ensuring compliance with EU competition law, and that private damages actions before the courts of Member States can make a significant contribution to ensuring such compliance.

²¹¹ See Commission White Paper on Damages actions for breach of the EC antitrust rules; Commission Press Release IP/08//515 and MEMO/08/216.

²¹² See 'Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' OJ L 349, 5.12.2014, p.1-19.

²¹³ See n 92, Ashurst Report.

²¹⁴ Ibid; See also Alexander Italianer, 'Public and private enforcement of competition law' Speech at the 5th International Competition Conference, Brussels, 17 February 2012.

²¹⁵ See Case T-437/08, *CDC Hydrogen Peroxide Cartel Damage Claims v Commission* [2011] ECR II-08251.

A victim must present all the evidence before the court that the breach in effect caused harm to her. The claimant must therefore, prove that she suffered harm due to the breach the company was found guilty of. The complexity of competition cases which demand economic evidence,²¹⁶ and the reliance on substantial quantities of documentary evidence incurring lengthy delays in the conclusion of cases are a disincentive for victims.

Further, the cost of bringing a damages action in itself may discourage victims, particularly given the difficulty in obtaining sound evidence. As the Ashurst report²¹⁷ revealed, in all Member States costs had to be paid upfront and, except for two Member States, the English rule of 'the loser pays' applied.²¹⁸ English courts have so far adopted the rule loser pays in civil claims, which is another dilemma for victims to consider before making a claim.²¹⁹

A research by the OFT found that companies, and their advisers view private actions as the least effective aspect of the competition regime in achieving compliance.²²⁰ However, when asked for suggestions as to what could be done to improve compliance with competition law in the UK, the most frequent responses included encouraging private actions!²²¹ Although 45 of the 202 companies surveyed by the OFT (22 per cent) thought that their company had been harmed by a breach of competition law by someone else, only five companies decided to bring an action. The most commonly cited reason for not bringing an action was that the expected costs outweighed the benefits. It can be assumed that a consumer would be in a worse position than a company, to be able to afford a private action. Under the new reforms, a broader range of representative actions including individuals, and trade associations may ask the CAT to include all UK victims affected by an infringement.

2.4.2 The UK Enforcement Authorities: OFT replaced by CMA

In the UK, the principal national enforcement authority has been the OFT, until changes were made by the ERA 13, which received the Royal Assent on 25 April 2013, combining the existing Office of Fair Trading (OFT) with the Competition Commission (CC) to form a single

²¹⁶ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, [7], [8].

²¹⁷ See n 92.

²¹⁸ Civil Procedure Rule 44.2(1) – In general, the principle is that the losing party will be ordered to pay costs to the winning party. A costs order is at the discretion of the judge and can vary according to the circumstances of each case; See *Begum v Birmingham City Council* [2015] EWCA Civ 386.

²¹⁹ However, as from April 2013, under the Jackson reforms the liability for costs under civil claims (at least some of them, eg personal injury claims) has shifted from unsuccessful defendants to successful claimants, which may also result in the victim with nothing left, having won the case but the winnings engulfed by costs. A new civil costs regime was brought in with the Royal Assent of the Legal Aid, Sentencing and Punishment of Offenders Act on 1 May 2012, (effective from April 2013) largely incorporating proposals suggested by Lord Justice Jackson. (The Legal Aid, Sentencing and Punishment of Offenders Act 2012).

²²⁰ See OFT, 'The deterrent effect of competition enforcement by the OFT' (OFT962 and OFT963), A Report prepared for the OFT by Deloitte, November 2007.

²²¹ Ibid.

unit called the Competition and Markets Authority (CMA), which began its operations on 1 April 2014.²²²

The sectoral enforcement authorities have concurrent powers with the OFT/CMA,²²³ but during the OFT's lifetime they mainly dealt with sector-specific legislation, rarely venturing into competition decisions. The ERA 13 expects to bring sector regulators in line with the enforcement of competition regulations.

Since the establishment of the CMA, a new networking system between the CMA and the sector regulators have been launched, named the UK Regulators Network (UKRN), to bring cross-sector regulation closer together.²²⁴ The UKRN is tasked with improving coordination across regulated sectors to enhance investment and efficiency for the benefit of consumers, belated but worthwhile aim if it is implemented effectively.

Importantly, under the Competition Act 1998 (Concurrency) Regulations 2014, the sector regulators and the CMA have established a UK Competition Network (UKCN) as a forum for exchange of information and best practice.²²⁵ Previously, sector regulators have generally been reluctant to exercise their CA 98 functions, relying instead mainly on their sector-specific legislation.²²⁶ The NAO has found that there is a perception among Regulators that the competition process including appeals to be onerous.²²⁷ Under the new regime, the CMA has the ability to remove a competition case from a sector regulator if the CMA considers that doing so will further the promotion of competition.²²⁸

Since the CMA came into being in April 2014, apart from the cases transferred from the OFT, it has started some cases of its own including a number of wide ranging sector specific cases particularly energy and banking sectors. The CMA has brought its first prosecution under s

²²² CMA8, Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases, March 2014; See The CMA's application of EC Regulation 1/2003 and the United Kingdom legal exception regime (CMA Guidance, Competition law modernisation: OFT442, 1 December 2004).

²²³ The Competition Act 1998 (Concurrency) Regulations 2004, SI 2004/1077; OFT, Concurrent application to regulated industries, OFT 405 (December 2004); Concurrent competition powers in sectoral regulation, a report by the Department of Trade and Industry, (TSO, 2006); House of Lords Select Committee on Regulations, UK Economic Regulations, HL. 189-1 (TSO, 2007); National Audit Office, Review of the UK's competition landscape (TSO, 2010).

²²⁴ Ofcom press release, 'UK regulators launch new network to bring cross-sector regulation closer together' 19 March 2014. The sector regulators involved are: CAA for aviation, FCA for finance, Ofcom for Communication, Ofgem for energy, Ofwat for water, ORR for railways, and also UREGNI for Northern Ireland utilities. Monitor (health), and the WICS of Scotland for water are participating as observers; previously, under the OFT, there was a Concurrency Working Party (CWP) for networking to avoid double jeopardy in dealing with sector issues.

²²⁵ CMA press release, 'Network launched to help drive competition in regulated sectors' 3 December 2013. The CMA has drawn up a 'UKCN Statement of Intent' under the network.

²²⁶ NAO, 'Review of the UK's Competition Landscape' 2010, para 10; See also NAO Report 'The UK competition regime' 2016, (Summary), para10.

²²⁷ NAO, 'Review of the UK's Competition Landscape' 2010, para 10.

²²⁸ See 'UKCN Statement of Intent' (n 212), p 7; See also David Currie, 'The new Competition and Markets Authority: How will it promote competition?' Speech by CMA chairman to the Beesley Lectures, London, 7 November 2013, (sec 3).

188 of EA 02 where three defendants were charged for operating a cartel in the supply of galvanised steel tanks.²²⁹ One of the defendants has pleaded guilty while the other two have been acquitted following trial by jury. A parallel civil investigation is also on going for infringement of CA 98. Under a consumer offence, the CMA has also brought a criminal case before the Bristol Crown Court in which a number of defendants were convicted.²³⁰ Both cases were started during OFT's term in office, which shows if the OFT were so minded prosecutions were possible even minus the subsequent changes brought on by the ERA 13.

Interestingly, the CMA has publicly stated its intention to reduce relying on leniency, stating that Leniency Programmes have their limitations and tend to catch 'late stage' or failing cartels only. Further, the CMA expressed its intention of being proactive in detecting cartels by evolving fully into a 'mainstream criminal enforcement agency'.²³¹ However, thus far the CMA appears to have opted for settlements of cases on grounds of administrative priority.²³² The NAO has made the observation that the CMA has so far not produced a substantial flow of enforcement decisions or fines.²³³ For the purpose of this thesis the term OFT will still be used as OFT decisions come under its purview.

2.4.3 Key Provisions Available to the OFT/CMA under CA 98

The Director (formerly Director General of Fair Trading (DGFT), with the assistance of the OFT/CMA has primary responsibility for enforcing the Chapter I prohibitions and has extensive powers of investigation, which include the power to carry out 'dawn raids', or on-the-spot investigations at the premises of businesses suspected of infringements. If it finds sufficient evidence of an infringement, it has the power to order the infringement to be terminated, and to impose on the infringers a fine of up to 10 per cent of their UK turnover for each of the previous three years. In cartel cases, the Director can grant leniency in the form of immunity from fines and prosecution, or reductions in fines where a participant in the cartel has provided the OFT/CMA with 'significant evidence' which enables a finding of breach of CA 98 at an early stage of the investigation.

²²⁹ Case Reference: CE/9691/12, Supply of galvanised steel tanks for water storage, 2014; CMA, News: 'Director sentenced to 6 months for criminal cartel' 14 September 2015.

²³⁰ Case Ref: CE9062/08, 2014. (Pyramid promotional scheme case); CMA press release, 'Pyramid scheme organisers ordered to pay over £500,000, 21 July 2015. (Bristol Crown Court, not yet reported).

²³¹ King & Wood Mallesons, 'CMA outlines measures to tackle cartel enforcement in the UK' *Community Week Newsletter & Alert*, 05 February 2015.

²³² OFT1263rev, 'A guide to the OFT's investigation procedures in competition cases' 2012, paras 10.2 and 10.3; See CMA Press release: 'Companies fined over £775,000 in CMA investigation into advertising of agents' fees' 19 March 2015. This was a Chapter 1 case started by the OFT in December 2013.

²³³ National Audit Office, 'The UK competition regime' 2016, (Summary) para 15; See also Antony Seely, 'The UK competition regime' Briefing Paper, No. 04814, (2016), p 20.

Under CA 98, the OFT/CMA shares its investigative powers concurrently with certain sector authorities such as Ofgem for gas and electricity, OFCOM for communication, Ofwat for water and ORR for railways.²³⁴ Further, s 60 of CA 98 applies to all UK authorities which are involved with the enforcement of Part I of the CA 98, i.e. the OFT/CMA, the sector Regulators, Competition Appeal Tribunal (CAT) and the domestic courts. Decisions taken by the OFT are appealable to the Competition Appeal Tribunal (CAT), by an aggrieved party.

2.5 The CAT

The Competition Appeal Tribunal deals with all appeals connected to competition law matters. Section 46 CA 98, and judicial review principles under s 120 EA 02, apply to procedure taken by the CAT in deciding appeals on competition law matters.²³⁵

The CAT is directed to determine such an appeal on the merits by reference to the grounds of appeal. The CAT is allowed to confirm or set aside the decision which is the subject of the appeal, or any part of it, and may remit the matter to the OFT/CMA or any other regulator. The CAT could impose or revoke, or vary the amount of a penalty imposed by the OFT/CMA, and can give such directions or take such other steps as the OFT/CMA could itself have given or taken, or make any other decision which the OFT/CMA itself could have made. Even if the CAT confirms the OFT/CMA decision, it may still set aside a finding of fact made by the OFT/CMA.²³⁶ When the appeal is on the merits, the CAT's function is not limited to applying the principles of judicial review nor to the heads of review contained in Article 263 TFEU.²³⁷

The CAT emphasised in *Freeserve* that it was an appellate tribunal and that if it felt the Regulator was incorrectly informed, it should in general remit the matter to the Regulator to decide again, rather than make its own decision.²³⁸ In *Floe Telecom* the CAT set aside the Decision of OFCOM and decided to 'remit' the matter to OFCOM under paragraph 3(2)(a) of Schedule 8 of CA 98, 'on grounds of incorrect and/or inadequate reasoning.'²³⁹ However, the CAT has desisted from thus remitting in *JJ Burgess* on the basis that it should, if necessary, take its own decision rather than remit, 'if: i) it has or can obtain all the necessary material, ii) the requirements of procedural fairness are respected, and iii) the course the Tribunal

²³⁴ Modernisation: Understanding competition law, OFT's Competition Law Guideline, December 2004, para 4.28.

²³⁵ Currently a draft Bill is under consideration to bring CAT rules to correspond with Consumer Rights Act 2015.

²³⁶ CA 98, Schedule 8, para 3.

²³⁷ *Freeserve.com v Director General of Telecommunications* [2003] CAT 5, para 106; [2003] All ER (D) 72 (May).

²³⁸ *Ibid.*

²³⁹ *Floe Telecom v Office of Communications* [2004] CAT 18, para 340.

proposes to take is desirable from the point of view of the need for expedition and saving costs.²⁴⁰

Third parties, as well as undertakings subject to enforcement authorities' decisions, may appeal to the CAT under s 47 CA 98. Decisions of the CAT may be appealed, on a point of law to the Court of Appeal, under s 49 CA 98.²⁴¹

2.5.1 CAT's New Claws under the Consumer Rights Act 2015

Changes to the powers and procedures of the CAT have been brought about by amendments in the CRA 15.²⁴² While victims of anticompetitive behaviour by undertakings could only bring 'follow on' actions before the CAT up until these reforms, the CAT can now take on 'stand-alone' actions as well. Along with this important development, the CAT will have power to grant injunctions, particularly with regard to fast-track cases that may help small and medium-sized enterprises (SMEs). An opt-out system for victims is also made available provided certain conditions are met. The new powers of the CAT have been strengthened to equal that of the High Court in dealing with competition matters. Henceforth, the CAT can issue search warrants also under CA 98 in cartel investigations.

2.5.2 Conclusion

UK competition law is fashioned in accordance with the EU competition law which takes precedence over Member States. The most important sources are derived from EU legislation and have direct effect within the UK. Apart from adopting the EU legislation into its own law by way of CA 98, the UK enforcement authorities are empowered to implement Articles 101 (and 102) of the TFEU fully where the effect of an infringement committed in the UK extends beyond its territory into one or more other member state or states. Both Chapter I, CA 98 and Article 101 TFEU deal with cartels which are considered to be the most serious of anticompetitive infringements which prevent, restrict or distort competition. Cartels are agreements by two or more economic entities in order to make profits with less effort. Being

²⁴⁰ *JJ Burgess & Sons v Office of Fair Trading* [2005] CAT 25, para 132.

²⁴¹ However, an appeal only of paragraph 3 of an Order by the CAT was upheld by the Court of appeal, with much criticism levelled at the Order of the CAT. See *Ofcom and T-Mobile v Floe Telecom* [2009] EWCA Civ 47.

²⁴² Consumer Rights Act, 2015 brings in amendments with regard to private actions in competition cases and appointment of judges to the CAT, effecting amendments to both CA 98 and EA 02. (Part 1 Schedule 8 Consumer Rights Act 2015 amends sections 47A, 47B, 49, 58, 58A and 59 of CA 98 and inserts new sections 47C to 47E and 47A to 49E, introducing significant reforms to CA 98).

illegal, undertakings engage in cartels in secret, making it difficult to detect them. Because of this secrecy which makes it difficult to gather evidence, enforcement authorities employ leniency programmes to uncover evidence. In the UK, under EA 02 cartel activities are deemed criminal, and prosecutions can be brought against offenders, although this aspect of the law has barely been implemented. Under the new ERRA 13, cartel offence has been redefined, removing the element of 'dishonesty' previously alleged in infringement cases, which is expected to ease some of the difficulties surrounding convictions. The CMA which has replaced the OFT in 2014 as the principal enforcement authority in the UK, has expressed its intention to bring about more prosecutions. The CMA has been formed combining the former OFT with the former Competition Commission (CC), so that it is now invested with some of the powers held by the CC in addition to most of those held by the OFT.

The Leniency Programme is not embodied in EU competition law, but introduced by a Commission Leniency Notice. While Commission notices are not binding on member states, they nevertheless act as guidance for member states which are expected to work in cooperation with Commission regulations and guidance rules. Leniency is an old concept to induce offenders to confess on offer of rewards. Leniency is offered to those who act in breach of the competition legislation, to come forward and confess in return for amnesty or reduction of penalty. On obtaining leniency, applicants are provided confidentiality of the leniency agreements, making it hard for victims to access such documents to produce as evidence in private actions. Despite leniency, a research by Ashurst has shown that fewer cartel cases are coming to light than expected. Decentralisation brought in by Regulation 1/2003 was meant to empower national courts to directly apply exemptions under Article 101(3), and bring about uniformity in the implementation of EU antitrust law among Member States. It was also expected to enable more private actions by individuals harmed by anticompetitive activities. Nevertheless, the expected increase in private actions has not materialised, with victims unable to access vital evidence.

The intended goal of EU competition law has not been clearly stated giving rise to various interpretations by economists. However, the EU, and consequently the UK enforcement authorities have stressed that their main goal is consumer welfare, although CJEU decisions show competition in the internal market play a major role in most of the decisions²⁴³

UK's competition law is enforced by the principal enforcement authority, the OFT/CMA and the sector authorities concurrently. Appeals from any competition law decision made by the enforcement authorities can be heard by the CAT. Under CRA 15, the CAT may now also hear

²⁴³ See sec 2.2.3.

'stand-alone' actions, whereas before only 'follow-on' damages actions were allowed before the CAT. The CRA 15 has also put in place an 'opt-out' system to allow for Collective Proceedings in addition to the 'opt-in' system which was the only course available for class actions before.

This chapter has outlined the sources of law relating to cartels, and why leniency would be granted to colluding businesses. The chapters that follow will be on the topic of leniency as applied in competition law in the main, and the effect leniency has in detecting cartel activity by undertakings. Chapter Three will discuss the economic theories postulated by economists in their experiments in the application of leniency in antitrust law.

CHAPTER 3

Economic Tests and Theories - Stochastic Lemmas

3.1 Introduction

Economists have been at the forefront of the introduction of a leniency programme in the enforcement of competition law. Leniency programmes are intended to encourage firms involved in anticompetitive behaviour to come forward and confess, providing evidence of their anticompetitive activities in exchange for amnesty or reduction in fines. Most economists theorise in favour of leniency but cannot quite agree to what extent it should be applied. Each economist argues that his particular intuitive proposition can be proved by a stochastic lemma (formula). Economists keep experimenting on mainly the formation and destabilisation of cartels in the context of how participants react to leniency programmes. It is not the intention of this chapter to decipher the elaborate lemmas used in the many and varied economic theories, but to examine the theories themselves, beginning with some of the earlier theories. Most of the following theories have been based mainly on intuitive propositions of the respective authors which have then been put to experiment (referred to as 'laboratory experiments') by scientific formulae which have given the desired effect or proof. One of the more recent theories which draws on what is called Theorem 4 is an interesting, and a plausible one which tallies with conclusions arrived at by Conner²⁴⁴ and Guersent.²⁴⁵ This chapter also refers to a few empirical studies, as the authors suggest, but they are in effect examinations of detected cartels (statistical studies), and as such do not reveal any unknown characteristics or phenomena that could improve detection per se.

²⁴⁴ See John M Connor, 'The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals, (2008) American Antitrust Institute Working Paper, No. 08-02; See also John M Connor, 'A Critique of Partial Leniency for Cartels by the U.S. Department of Justice' (2008) Purdue University (AAI) Working Paper < <http://ssrn.com/abstract=977772> > last accessed 10.08.2015.

²⁴⁵ See Olivier Guersent, 'The EU Model of Administrative Enforcement against Global Cartels: Evolving to Meet Challenges' in Claus-Dieter Ehlermann & Isabela Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing 2007).

3.2 Self-reporting as a means of Detecting Infringements

Steven Shavell is considered to be the first proponent of self-reporting as a viable mode of detecting anticompetitive behaviour.²⁴⁶ Although not a new concept, the analysis of the effects of self-reporting schemes for individual crimes was advanced, following on from Becker, by economists Malik, Kaplow and Shavell. Kaplow and Shavell demonstrate that when the expected fine equals the harm, an individual will commit a harmful act if, and only if, the gain he would derive from it exceeds the harm he would cause. Assuming that fines are the form of sanction, and assuming individuals are risk neutral, then the optimal fine f is h/p , the harm divided by the probability of detection, whereby the expected fine equals harm.²⁴⁷ This fine is optimal because, when the expected fine equals the harm there will be no gain for the colluder if he is caught and fined. If individuals are risk averse, optimal fine could be lower than for risk neutral case. When greater law enforcement is not associated with a significant reduction in crime, the explanation could be either that deterrence and incapacitation are relatively unimportant, or else that their importance is masked because enforcement effort, and sanctions are increased in response to higher crime rates. They suggest that incentives of law enforcers, including the problem of corruption should be investigated.

3.2.1 Cost Effectiveness and Hard Evidence

Kaplow and Shavell regard that the main benefits of the leniency policies are twofold, i.e. the cost effectiveness, and that self-reporting provides hard evidence for successful prosecution.²⁴⁸ If colluders come forward and confess, the enforcement authorities save up on resources by not having to look for them and as hard evidence is provided voluntarily by the colluders there will be savings on investigations which the authorities would otherwise have to carry out. Kaplow and Shavell equate self-reporting to the model of probabilistic law

²⁴⁶ See Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 (2) *Journal of Political Economy* 169-217; Arun S Malik, 'Avoidance, screening and optimum enforcement' (1990) 21(3) *RAND Journal of Economics* 341-353; Arun S Malik 'Self-reporting and the design of policies for regulating stochastic pollution' (1993) 24(3) *Journal of Environmental Economics and Management* 241-257.

²⁴⁷ Louis Kaplow and Steven Shavell, 'Economic Analysis of Law' (Ch. 25) in Alan Auerbach and Martin S Feldstein (eds), *Handbook of Public Economics* (Elsevier, 2002), 1661-1784, para 6.2.1 at 1748; See Lucian Bebchuk and Louis Kaplow, 'Optimal sanctions when individuals are imperfectly informed about the probability of apprehension' (1992) 21(2) *Journal of Legal Studies*, 365-370; Louis Kaplow and Steven Shavell, 'Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice' (2003) 32(1) *Journal of Legal Studies*, 331-362; A Mitchell Polinsky, and Steven Shavell, 'Corruption and Optimal Law Enforcement' (2001) 81(1) *Journal of Public Economics* 1-24.

²⁴⁸ See Louis Kaplow and Steven Shavell, 'Optimal Law Enforcement with Self-Reporting of Behaviour' (1994) 102(3) *Journal of Political Economy* 583-606.

enforcement.²⁴⁹ However, Kaplow and Shavell recognise the disadvantage of self-reporting in that the enforcement agencies would incur administrative costs with certainty when an individual reports his behaviour and pays a sanction, whereas without self-reporting, society bears administrative costs only with a probability.²⁵⁰ They do not explain the long-term impact of leniency on criminal behaviour. Leniency has been in use over centuries, in war and other criminal activities,²⁵¹ without any obvious reduction in such activities to date.

Toffel and Short in their Working Paper suggest that self-reporting indicates effective self-policing.²⁵² Firms that voluntarily disclosed regulatory violations were committed to self-policing and improved their regulatory compliance. They find that self-reporting can be a useful tool for reliably identifying and leveraging voluntary self-policing efforts by companies. This theory implies that rather than adhering to compliance in the first place, firms could make their decisions regardless and self-report later, on sensing trouble? The US Antitrust division has said that international cartels tend to be complex, highly sophisticated, and extremely broad in their impact both in geographical scope and the amount of commerce affected.²⁵³ It is difficult to contemplate that such sophisticated colluders are unaware of compliance rules or the consequences of getting caught.

3.2.2 Desistance Deterrence and Costless Penalties

A different view by Motta and Polo, shows that leniency enhances desistance but harms deterrence.²⁵⁴ Using a dynamic model they show that a programme which restricts itself to spontaneous reporting before an investigation is started cannot deter incentives to enter into a cartel. A cartel that is stable which has no intention to report will not be affected whether a leniency programme exists or not. Further, post-investigation leniency may even provide incentives to collude as the expected fines are reduced. The main reason for self-reporting (in this situation) occurring due to a change in the equilibrium of probability that a conviction would result on the screening of an industry. Leniency may have affected short-run cartels more, but consolidated the stable, long-run ones. Motta and Polo's theory does not appear to take into consideration that distrust between colluders could be a factor in self-reporting, where one or more participants may wish to take advantage of leniency by undercutting

²⁴⁹ Ibid p.584.

²⁵⁰ Ibid p.600.

²⁵¹ See n 174.

²⁵² Michael W Toffel and Jodi L Short, 'Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?' (2011) 54 (3) *Journal of Law and Economics* 609-649.

²⁵³ Gary R Spratling, 'Criminal Antitrust Enforcement Against International Cartels' Speech at Advanced Criminal Antitrust Workshop: A practical Approach to Criminal Investigations, Phoenix, Arizona, 1997.

²⁵⁴ See Massimo Motta, and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347-79.

another. Nevertheless, the OFT cases examined in Chapter 5 of this thesis show that very few cartels self-report unless there is a threat of being found out.²⁵⁵

Aubert, Rey and Kovacic support the proposition that positive rewards have a larger deterrence effect than reduced fines, and that rewards for individuals (whistleblowers) can be more effective than corporate rewards.²⁵⁶ In their model, they attempt to show that reward programs can be adapted to mitigate potential adverse effects (such as generating additional incentives to collude). According to their model, rewards are stronger tools than leniency programs to deter cartel formation. Rewards should be large enough to be effective and to avoid potential adverse effects. They even suggest keeping large rewards secret from the public to avoid unrest! Their proposition of large rewards for individuals, for example employees, may prove right in some cases. However, firms can simply adopt tacit non-cooperative strategies that lead to a coordinated outcome as happened in *Woodpulp*²⁵⁷ in which the Commission asserted that parallel evolution of prices charged by the wood pulp industry between 1971 and 1981 in Europe was evidence of collusion. But the decision was overruled by the CJEU, thereby giving life to the principle that parallel pricing cannot be taken as anticompetitive.

3.2.3 Optimal Leniency and Whistleblowers

Spagnolo, points to an optimal leniency programme where a well-designed program must maximise incentives to betray the cartel by reporting important information to the Antitrust Authority, while at the same time limiting as much as possible the reduction in fines on the whole cartel. Spagnolo is of the view that such an objective can be achieved by maximizing the benefits an individual cartel member can receive from reporting under the leniency program, but restricting such maximal benefit to one, and only one reporting party, the first comer.²⁵⁸

He argues that the best deterrence could be achieved by promising the first informant a reward equal to the sum of fines levied from other participating firms. In an earlier paper (2005) under the same title, Spagnolo provides a whistleblower scheme to improve leniency programmes, and states that the same format could be extended to fight other forms of multi-agent

²⁵⁵ See Chapter 5.

²⁵⁶ See Cecile Aubert, William Kovacic and Patrick Rey, 'The Impact of Leniency and Whistle-blowing Programs on Cartels' (2006) 24 (6) International Journal of Industrial Organisation, 1241.

²⁵⁷ See Joined Cases 89/85, *Ahlstrom Osakeyhtiö v Commission (Woodpulp)* [1994] ECR I-99.

²⁵⁸ See Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' in Paolo Buccirossi (ed) *Handbook of Antitrust Economics* (The MIT Press, Cambridge 2008).

organised crime like auditor-manger collusion, financial fraud, or long-term corruption that share with cartels the crucial features that leniency programmes are targeting.²⁵⁹

The OFT/CMA has a reward scheme whereby an informer could receive £100,000 for reporting a cartel.²⁶⁰ It would be interesting to know how this reward has helped the UK authorities in detecting cartels, but no such data is available, probably due to the informer confidentiality.

3.3 Collude and Report Strategy and Carrot and Stick Method

Hinloopen and Soetevent show that 'collude and report systematically' is a strategy that could be adopted by cartelists when leniency programs are too generous.²⁶¹ Reporting the cartel becomes part of the cartel agreement, and the participants collude and apply for leniency in every period to benefit from the reduction of fines. They contend that the increase in the number of cartels detected in the US and in Europe since the introduction of leniency programmes cannot be ruled out being due to increased cartel activity. In their experiment they find, however, that fewer cartels are formed when a leniency programme is in place, and cartels that do exist are less successful in charging prices above the static Nash equilibrium price and these cartels have lower survival rates. If the penalties are severe enough, particularly with criminal sanctions,²⁶² clearly there is an incentive to self-report. Strategic self-reporting has been found to exist, in a survey by Sokol, the only published survey outside the UK (as far as this research was able to find), involving interviews with practitioners.²⁶³

Sauvagnat hypothesises that higher the leniency, with a more generous carrot or a harsher stick (higher fine), the more it reinforces the firms' incentives to betray the cartel.²⁶⁴ Full amnesty is optimal in that it triggers applications, and the increase in the conviction rate outweighs pro-collusive effect of granting greater leniency. He puts forward the proposition that comparative statics of the probability of initial evidence reaching the enforcement authority

²⁵⁹ See Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' preliminary paper prepared for LEAR's conference on Advances in the Economics of Competition Law, 2005.

²⁶⁰ CMA, 'Cartels – Informants Reward Policy' Guidance, 2014.

²⁶¹ See Jeroen Hinloopen and Adriaan R Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' (2008) 39(2) *The RAND Journal of Economics* 607-616.

²⁶² Scott D Hammond, 'Cornerstones of an Effective Leniency Program' Speech before the ICN Workshop on Leniency Programs, Sydney, Australia, 2004, sec III.

²⁶³ D Daniel Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201-240, p 203.

²⁶⁴ See Julien Sauvagnat, 'Prosecution and Leniency Programs: A Fool's Game' (2010) Toulouse School of Economics Working Paper, 10-188 < <http://www.tse-fr.eu/sites/default/files/medias/doc/wp/io/10-188.pdf> > last accessed 12.08.2014.

shows that leniency programmes and whistleblowing schemes play a complementary role in public enforcement. Hence, firms are more likely to self-report when enforcement authority is more likely to be informed by third parties about their illegal activities. He argues that the optimal leniency should be only given to a single informant, i.e. a unique cartel member.

If the self-reporting takes place only owing to a third party informer, this can happen even in the absence of Leniency, where other, non-corporate criminal activity caught through informers also receive lenient sentences on admitting guilt before the court. Even when there is a generous carrot, if the cartel is stable, and there is no fear of betrayal, then no self-reporting is likely to occur. It is, therefore, important that there should be a credible threat of detection, that of vigorous enforcement and severe penalties, not merely a threat of betrayal by a fellow colluder. Additionally, the threat of individual sanctions may have a deterrent effect on employees²⁶⁵ who could otherwise succumb to corporate pressure to engage in illegal activity, even if the cartel is stable, for fear of betrayal.

3.3.1 Let them Cheat and Cheat Again!

Chen and Rey argue that the best way to fight collusion is to induce firms to cheat and to report the cartel activity, which is why leniency is desirable – stricter regulation encourages alternative strategies - therefore optimal leniency to the first comer is best.²⁶⁶ Firms will form a cartel if the benefits from it exceed the expected penalty under antitrust enforcement. Therefore, deterring collusion ‘as much as possible’ amounts to maximising the threshold on collusive benefits below which collusion is deterred. In their model, Chen and Rey characterise the optimal degree of leniency, and show that both pre and post investigation leniency can help prevent the formation of some cartels and increase welfare unambiguously. They also advocate granting leniency to repeat offenders, because if no amnesty is allowed for repeat offenders this may prevent ‘collude and report’ strategy, but could result in reporting once, and never after. In this respect, Wils also argues against barring repeat offenders from leniency programmes.²⁶⁷ If companies cannot apply for leniency because they are repeat offenders, this second cartel will thus be more stable than the first. He states that excluding recidivists from leniency may encourage recidivism.

²⁶⁵ OECD, ‘Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, 2005, para 3.2 at 26.

²⁶⁶ See Zhijun Chen and Patrick Rey, ‘On the Design of Leniency Programs’ (2012) *IDEI Working Paper* <http://idei.fr/doc/by/reyleniency_v2.pdf> last accessed 09.04.2014.

²⁶⁷ Wouter Wils, ‘Efficiency and Justice in European Antitrust Enforcement’ (Hart Publishing 2008), footnote 139 at 138.

The contention that deterring collusion ‘as much as possible’ appears to be that the authors themselves are rather uncertain about their own theory or merely hoping for the best outcome. It also opens for the colluders to speculate that cartel activities are rife among businesses and the authorities may not take collusion as a serious matter. As for repeat offenders, a harsher penalty than for the previous infringement is called for,²⁶⁸ even if a reduction may be allowed for admitting the second offence. The Commission’s 2006 Fining Guidelines have set higher fines for recidivists,²⁶⁹ although whether strict adherence to the rules has taken place is subject to question.²⁷⁰

3.3.2 Higher Revelations and Shorter Duration

Brenner conducted an empirical survey of investigated cases by the European Commission before and after the introduction of leniency policy, taking a sample of 245 firms which were involved in 53 cartel infringements.²⁷¹ These cases were dealt with by the Commission between 1990 and 2003. The survey found there was a high level of information revealed under leniency than without, but the impact of leniency on investigation cost was found to be weak. Further, the stability of cartels did not differ pre and post leniency. Interestingly, cartel duration shortened by one year after the introduction of leniency programme. The shortest observed cartel lasted only a quarter of a year while the longest running cartel lasted for 23 years.

Brenner notes, however, that economic theories provide no conclusive answer on whether leniency programs are sufficient incentives for firms to refrain from cartel activity. It may be some factors help towards deterrence, and some others do not. This is due to the fact that no empirical study could be taken of the hidden cartels for an accurate survey. What was important to come out of this survey was the observation that there was no statistically significant relationship between investigation duration, and cooperation by the infringing firms, although the average duration of an investigation decreased after the introduction of the

²⁶⁸ Case C-3/06 P *Danone v Commission* [2007] ECR I-1331, [26].

²⁶⁹ Guidelines on the method for setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, [2006] OJ C210/2; European Commission press release IP/06/857 of 28 June 2006, ‘Competition: Commission revises Guidelines for setting fines in antitrust cases’.

²⁷⁰ Cento Veljanovski, ‘Deterrence, Recidivism and European Cartel Fines’ (14 July 2011), p11 < <http://ssrn.com/abstract=1758639> > last accessed 02.01.2016.

²⁷¹ See Steffen Brenner, ‘An empirical study of the European corporate leniency program’ (2009) 27 (6) *International Journal of Industrial Organization* 639-645. The cartels in the study varied between legal export, and illegal national and international price-fixing or market sharing agreements, hence the variation in the duration.

leniency policy. Significantly, the impact on investigation costs, has not been found to be strong, and the duration of cartels do not seem to be affected much by leniency either.

In general, the number of cartels detected before and after a certain regulatory event is a poor indicator of whether firms' propensity to collude has increased or decreased. The increase may be because the new regulation is efficient or because there is an increase in cartels of which either more of them or relatively less number were detected. Barriers to trade and investment were lowered between the national markets within the EU in the 1990s which could have given rise to an increase in cartels EU wide.

3.3.3 Average Cartel Duration

According to a study by Levenstein and Suslow, the average cartel duration has not changed substantially over the past century.²⁷² The average duration of cartels estimates between 5.3 and 8.3 years, therefore the rise in convicted cartels may be due to the natural break down of these cartels. They find that cartels put substantial effort into monitoring one another's activities in order to increase observability of events relating to demand variability, and changes in their competitors' prices, enabling the stability of the cartels. The fact that the antitrust authorities take an action which ultimately puts an end to the cartel does not vitiate the economic analysis, resulting in the antitrust authorities becoming the instrument of the defecting firm. They found that cartels broken up by amnesty applications were relatively long-lasting cartels, with an average duration of 10.3 years.

The fact that colluders put considerable effort into monitoring to keep the stability of the cartel shows that cartels are well organised, so that betrayal is prevented and the cartel can continue for as long as profitable to do so. The average duration is testimony to the sophistication with which cartels operate. Leniency could be used strategically²⁷³ by such cartels for their own gain.

In a study by Evenett, Levenstein and Suslow,²⁷⁴ of a sample of forty private international cartels investigated and prosecuted in the US and the EU in the 1990s, twenty-four lasted at least for four years. For twenty of these cartels where sales data are available, the annual

²⁷² See Margaret C Levenstein and Valerie Y Suslow, 'Breaking Up Is Hard to Do: Determinants of Cartel Duration' (2011) 54 (2) *Journal of Law and Economics* 455.

²⁷³ See D Daniel Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201–240.

²⁷⁴ See Simon J Evenett, Margaret C Levenstein, and Valerie Y Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2002) World Bank Policy Research Working Paper No. 2680. (See also the earlier article by the authors of the same title in, (2001) 24(9) *The World Economy* 1221-1245).

worldwide turnover in the affected products exceeded US \$30 billion. They believe criminalising cartels is critical to strengthening enforcement. Conceding that economic theory does not identify deterministic relationships between industry or company structure and cartel success, they argue for a more comprehensive approach to attacking distortionary cartels in the international market place rather than limiting deterrence measures to domestic markets.

It may be pointed out that the US has dealt with international cartels in the main, albeit to protect the US market which has networks around the globe. Even with stricter regulations in place in the US than in the EU, there appears to be no abatement or deterring of hard core cartels even in the US. Although criminal in nature, the US Antitrust Division encouraging 'Plea Bargaining' or 'plea agreements'²⁷⁵ may have a diluting effect on the enforcement of antitrust law as with 'settlement agreements' in the UK,²⁷⁶ similar to EU antitrust settlements.²⁷⁷ The colluders who are usually large companies with huge annual turnovers will not fear paying up under such agreements, gaining immunity under Leniency as well.

3.4 Theorem 4

By their latest experiment, a more illuminating theorem has been produced by Harrington and Chang, in November 2013.²⁷⁸ They suggest that success should be judged by lesser cartels and not by greater number of leniency applications. If probability of investigation is low, then a fewer number of colluders will apply for leniency. The impact of leniency is intrinsically tied to the level of non-leniency enforcement. If leniency policy is successful, resulting in fewer cartels that means enforcement authority will have more resources for effective investigation. The fact that an enforcement authority's attention will shift from non-leniency cases to leniency cases does not mean that non-leniency enforcement is weaker.

Contrary to existing results in economic theories and the general impression of practitioners, Harrington and Chang find that a leniency programme can result in more cartels, and that it can occur at the same time that a leniency programme is generating many applications. They

²⁷⁵ Scott D. Hammond, 'The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All' OECD Competition Committee, Working Party No. 3, Paris, France, 2006.

²⁷⁶ CMA, CMA8, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' 2014, p 78.

²⁷⁷ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) 1/2003 in cartel cases, (Text with EEA relevance), Official Journal C 167, 2.7.2008, pp.1 – 6, (as amended by Commission Communication, 2015, OJ C 256/02, p. 1).

²⁷⁸ See Joseph E Harrington, and Myong-Hun Chang, 'When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?' (2013) CRESSE Working Paper (European Summer School and Conference in Competition and Regulation).

then identify situations, and policies that an enforcement authority can pursue in order to bring about a leniency policy which will have the intended effect of reducing the number of cartels. There are nine steps or theorems in all in their paper, of which theorem 4 is the main topic discussed here as it covers several aspects in the stochastic model.

Collusion is incentive compatible if the current market condition is sufficiently low. Firms do not use leniency when market conditions result in the cartel being stable but may use it when the cartel collapses. If the cartel continuation is less productive or it collapses, a firm will apply for leniency if it reduces the penalty. Discussing the usage of the leniency program in equilibrium, Harrington and Chang note that an equilibrium either has no firms applying for leniency or all firms doing so because if at least one firm applies then another firm can lower its expected penalty by also applying for leniency. This implies that it is always an equilibrium for all firms to apply for leniency. For all parties to apply, means to minimise the penalty. A firm pays a fraction of the standard penalty (or zero penalty if full immunity is granted) when it receives leniency, and pays a fraction when all firms apply for leniency. An industry does not apply for leniency when it is still effectively colluding. That it is dying cartels that apply for leniency is consistent with EC experience.²⁷⁹

Maximum profit realisation ensures stability of a cartel, and it is stable for all market conditions so it never collapses internally. If a cartel is degenerative or less profitable, it could collapse under any market condition, and then will never collude. A leniency program reduces the frequency of cartels when non-leniency enforcement is fixed. The basis for this is, a leniency program increases the payoff to cheating because now a firm can reduce its penalty by simultaneously applying for leniency. This shrinks the set of market conditions for which collusion is stable, thereby reducing expected cartel duration and the value of colluding. Due to the lower value of colluding, a cartel no longer forms or has shorter duration leading to lower aggregate cartel rates.

There is a differential across the industries where a leniency programme can make collusion more difficult specifically for some, but not for others. Leniency programmes can be counterproductive when penalties are not severe enough, and the amount of resources saved by prosecuting a leniency case is not large enough. In that situation, a leniency programme raises the cartel rate. In their Theorem 4, Harrington and Chang state that; 'A leniency programme can have a perverse effect because, while it generally promotes deterrence, it can actually result in fewer cartels being shut down.'²⁸⁰ This is because leniency applications are

²⁷⁹ Ibid, [foot note 13 at 13]; See also p 18.

²⁸⁰ Ibid, p 18.

coming from dying cartels, and therefore prosecution of these are not shutting down active cartels. Leniency applications are adding to the enforcement authorities' case load and result in less room for prosecuting non-leniency cases which would have disabled well-functioning cartels. It is therefore better to take on fewer leniency cases, and more non-leniency cases because the latter would shut down more cartels and deter some cartels from forming.

If an enforcement authority is not actively engaged in enforcement, then introducing a leniency programme is sure to be effective in reducing the frequency of cartel forming, specifically if penalties are sufficiently severe, and the cases are handled with (case specific) less resources. The authors (Harrington and Chang) contend that other policies should also be considered, such as screening for cartels which would result in an increase in the probability of discovery.

Harrington and Chang's Theorem 4 could plausibly hold in some jurisdictions. A leniency programme raises cartels where; a) a leniency case takes up a reasonable amount of resources so that there is crowding out of resources for non-leniency cases; and b) penalties are not so severe that they do not significantly deter cartel formation. It seems quite likely that jurisdictions with active leniency programmes could be experiencing weakened non-leniency enforcement because of the crowding out of non-leniency methods of enforcement. As per b), many countries which have set legal caps on fines that are far below the incremental profit from colluding, do little to deter cartel formation. Thus a leniency programme is not assured of reducing the frequency of cartels, instead it can raise the cartel rate. To avoid this outcome, and to ensure that a leniency programme serves the cause of fighting cartels, a procedure that will expeditiously handle leniency cases must be set up.

In a previous paper, Chang and Harrington argued that the implementation of a leniency program may make collusion harder because the probability of detection increases. However, Harrington noted that leniency may also increase cartel formation, because the antitrust agency might focus the bulk of its efforts on prosecuting cases brought within the leniency program rather than investigate potential cartels outside of those discovered by leniency program.²⁸¹

²⁸¹ See Myong-Hun Chang and Joseph E Harrington, 'The Impact of a Corporate Leniency Program on Antitrust Enforcement and Cartelization' (2008) John Hopkins University, Department of Economics Working Paper 548.

3.4.1 Non-leniency Methods

Friederiszick and Maier-Rigaud, two members of the DG Comp recommended in their working paper that DG Comp should step up non-leniency enforcement methods, such as being active in detecting cartels.²⁸² They believe in ex officio enforcement based on economic criteria through proactive market monitoring. A robust enforcement strategy outside leniency can motivate compliance that would deter cartel formation. As Mariniello finds, EU fines account for a tiny proportion of the turnover of affected markets and in order to speed up investigations the Commission should increase resources dedicated to inquiries and, that fines should also be raised.²⁸³ Aggressive ex officio investigations would be the more effective way to deter cartels. Therefore, the need is to adopt a better and efficient methodology in detection at an early stage of anticompetitive behaviour.

Sokol and Fishkin provide qualitative survey evidence of antitrust law firms, that supports Harrington's theoretical insights, albeit the survey relates to mergers in antitrust law.²⁸⁴ Almost all the prior empirical researches have focused on detected and prosecuted cartel cases. They state, therefore, it is difficult to imply and conclude the impact of antitrust policy on collusion from only observed cases. Mariniello's assertion that, 'No reliable estimate exists of the probability of detection by antitrust authorities. By definition, such an estimate would require information on cartels that have not been uncovered.'²⁸⁵ is an affirmation of Sokol and Fishkin's conclusions.

3.4.2 Increase in Cartel Conviction a Result of Increased Cartel Formation?

Marvao and Spagnolo suggest that:

'Since every instance of collusion cannot be observed, interpreting an increase in the number of convicted cartels following a policy innovation as a 'success' – an interpretation

²⁸² See Hans Wolfgang Friederiszick and Frank P Maier-Rigaud, 'Triggering Inspections Ex Officio: Moving Beyond a Passive EU Cartel Policy' (2008) 4(1) *Journal of Competition Law and Economics* 89-113.

²⁸³ See Mario Mariniello, 'Do European fines deter price fixing' (2013) 4 *bruegel policy brief* 1-8.

²⁸⁴ See D Daniel Sokol and James A Fishkin, 'Antitrust Merger Efficiencies in the Shadow of the Law' (2011) 64 *Vand. L. Rev. En Banc* 45.

²⁸⁵ See n 283, p 2.

adopted by some in relation to the reform of the US leniency policy in 1993²⁸⁶ – is an elementary logical mistake.²⁸⁷

An increase in cartel convictions may be the result of an increase in cartel formation which again could be the result of lenient law enforcement. What matters for welfare is deterrence and prices, not the number of self-reports which by themselves increase the workload of enforcement authorities and prosecution costs. Therefore, the regulators should be focused on improving welfare, by increasing cartel deterrence and lowering prices. Having evaluated a number of economic theories, Marvao and Spagnolo admit that laboratory experiments in themselves have several drawbacks, and should be carefully examined. Nevertheless, they conclude that there is increasing importance of leniency policies for competition authorities' daily enforcement work. They point to the growing number of leniency applications by firms in exchange for information and cooperation. They conclude that it is important to ensure that leniency policies are well designed, and properly administered for effective cartel deterrence. A poorly designed leniency policy or too generously administered leniency policy will allow cartelists to escape or offer reduced fines, and thereby encourage cartels that would not otherwise form. Generous leniency with mild sanctions are likely to maintain or increase deadweight loss from administration, prosecution and litigation costs with no balancing benefit to the tax payer.

3.4.3 Market Surveys More Effective than Leniency

Market uncertainty and detection uncertainty determine cartels. Xiaowei Cai states that government does not have to spend equal amount of resources on cartel detection and investigation across industries. Based on the market structure such as the concentration level, demand elasticity, industry size and the cost of entry which determine excess profits jointly, the enforcement agency might be able to use appropriate damage multiplier, and allocate just a small amount of resources to dissolve cartels without leniency. With leniency, even less resources would be enough to deter cartels.²⁸⁸ This is an important observation that can be adopted by regulators for better detection of concentrations in the market.

²⁸⁶ US DOJ, 'Corporate Leniency Policy' 1993 < <http://www.justice.gov/atr/public/guidelines/0091.htm> > last accessed 16.06.2016.

²⁸⁷ See Caterina Moura Pinto Marvao and Giancarlo Spagnolo, 'What Do We Know About the Effectiveness of Leniency Policies?' A Survey of the Empirical and Experimental Evidence' (2014), Part III Experimental Evidence on Leniency Policies < SSRN: <http://ssrn.com/abstract=2511613> > last accessed 16.06.2016.

²⁸⁸ See Xiaowei Cai, 'Effect of Corporate Leniency Program on Cartel Dissolution under Market Uncertainty' (2012) 2(4) *Advances in Management & Applied Economics* 141-160.

Given that market surveys are conducted by regulators, for example the OFT/CMA, their impact has not been impressive. Before the changeover to CMA, the OFT would carry out a market study which was Phase 1, and if found necessary, the OFT would refer it to the Competition Commission (CC) for an investigation which is Phase 2. A key element of the EA 02 policy was to relaunch market investigations as an instrument by the CC. High expectations fell short as there were only nine, by 2008. The former Chairman of the CC has regretted the tardiness in completing the investigations as well as the small number they were able to deal with. He was happy with the results of the investigations though, which were resolved without going into trial.²⁸⁹

The current CMA has taken over both Phases 1 and 2 of market surveys from the OFT and the CC, and has expressed its intention to make full use of it.²⁹⁰ If a mechanism produces good results it is worthwhile adopting it, with proper training for staff and maintaining such staff for long term, and using resources intelligently. The CMA is now entrusted with this task, and as it has already declared on reducing dependence on leniency, it is hoped market studies will be put to good use.²⁹¹ Correct case selection would be the key element in achieving success in this respect.

3.4.4 Pro- collusive Effect of Antitrust Law

Results from an experiment designed to analyse the general deterrence, and price effects of different antitrust policies by Bigoni, Fridolfsson, Le Coq, and Spagnolo show their main findings to be that: antitrust laws without leniency caught by fines following successful investigations have significant deterrence effects, and the number of cartels formed are reduced. However, antitrust laws also have a significant pro-collusive effect. Prices of the cartels formed increase, net welfare effect of antitrust laws appears negative.²⁹² They found, with leniency for the first party self-reporting, increases deterrence, leads to lower average prices, improves welfare, and reduces cartels. However, it yields no lower prices as against laissez-faire, as cartels formed under leniency regime are more stable than without.

²⁸⁹ Peter Freeman, Chairman, Competition Commission, 'Competition policy and interesting times- the role of the CC' Speech at the Competition Forum, 2 December 2008; See also CC report, 'Market investigation into the supply of groceries in the UK' 30 April 2008.

²⁹⁰ David Currie, CMA Chairman 'Open, competitive markets benefit consumers and businesses, and promote innovation and economic growth' Speech at the Law Society's Competition Section, 3 December 2014.

²⁹¹ Ibid.

²⁹² Maria Bigoni, Sven-Olof Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'FINES, LENIENCY, and REWARDS in Antitrust' (2012) 43(2) *RAND Journal of Economics* 368-390.

Deterrence may not always feed back into lower prices, the real goal of policy. They find, when rewards for whistleblowers financed by fines from competitors are introduced, average prices fall to competitive levels. Under this format, cartels are still formed mainly to cash the reward at partners' expense.

Ex ante deterrence is not an observable factor as usually victims are not aware, and therefore empirical research is difficult in this area compared to many other law enforcement policies. The deterrence effects of antitrust/leniency policies are difficult to evaluate as cartels, and changes in them are unobservable. Experiments that economists do can only take into account the observables, i.e. the detected cartels, therefore they have limitations. Maria Bigoni and others thus concede that deterrence effects of antitrust policies are particularly difficult to evaluate because the population of cartels and changes in it are unobservable. Hence, laboratory experiments are valuable but they have limitations. Although valuable, 'They can only estimate the effects of policies actually implemented, not those of the many available alternatives, and they focus on cartel formation rather than welfare.'²⁹³ They conclude therefore, generally under leniency, cartels are rarely re-formed, greatly reducing recidivism. And the prices on average are significantly lower. But culture may affect optimal law enforcement in different regions or countries. It can be concluded that in jurisdictions where enforcement is vigorous, or even aggressive, Leniency may help deterrence.

Thus, economic experiments can only estimate the effects of policies that are actually implemented, and the focus would be on cartel formation or their destabilisation, but not on competition or consumer welfare.

3.5 Conclusion

Leniency as a viable theory for detecting anticompetitive behaviour is based on an early formula, and developed later by subsequent economists. It has been postulated by economists such as Kaplow and Shavel that colluders will only commit a harmful act if, and only if, the gain they derive from it exceeds the likely fine they would receive on probable detection. They have claimed that leniency serves two purposes. One is that hard evidence will be provided by the applicants, which would otherwise be difficult to obtain as cartels are secret agreements. The other is, that if evidence is thus freely made available, the enforcement authorities would not have to expend their scarce resources in lengthy investigations, making it a cost-effective method. Toffel and Short suggest that self-reporting indicates effective self-

²⁹³ Ibid, p 369 (footnote not included).

policing. Aubert and others are fiercely supportive of large rewards to individual applicants rather than corporations, and even suggest keeping such rewards secret from the public to avoid unrest. Chen and Ray believe both pre and post investigation leniency can help prevent the formation of some cartels and increase welfare unambiguously.

From a reading of the various economic theories, it is interesting to note that while the earlier theorists show mostly positive results for leniency, the latest theorists find both positive and negative outcomes. The theories set out in this chapter are only a small cross section of the volume of lemmas postulated by a large number of past and present economic scholars. It is clear that the theories keep evolving with time and new experiences, so that each theory has its own story, the result being no two lemmas can produce exactly the same result. What is illuminating is that more and more of the new theories find that leniency has several drawbacks. Hinloopen and Soetevent show that generous leniency can prompt cartels to adopt a strategy of 'collude and report systematically'. Brenner, Harrington and Chang, Marvo and Spagnolo are some of those who find leniency a costly method. Evenett and others have found that cartels earning high turnover last longer, even up to 10 years or more. Harrington and Chang also found leniency applications come mainly from dying cartels and those that are less stable and weak, and they believe cartels are reduced when non-leniency methods are fixed. According to them, leniency policy can result in more cartels forming even as they generate more leniency applications. Harrington and Chang suggest that if leniency is effective, then there should be more resources available to enforcement authorities due to reduction in cartels. They opine that screening increases detection rather than leniency. Xiaowei Cai finds that market surveys based on market structure are more effective, and reduce costs than do leniency applications. This, as with Harrington and Chang's proposition can be a proactive method by which the risk factor for cartels is raised, and therefore, may lead towards deterrence.

Importantly, some of the economists themselves concede that economic theories do not provide conclusive answers to the question whether leniency programs are sufficient incentives for firms to refrain from cartel activity. This is mainly because economists have to rely on detected and prosecuted cartels, and it is difficult to conclude accurately the impact of policies from only observed cases without taking into account the hidden cartels. As Bigoni and others observe, economic experiments can only estimate the effects of policies actually implemented but not those of other alternatives, nor do they deal with consumer welfare. Moreover, as Evenett and others point out, economic theory does not identify deterministic relationships between market structure and cartel success. They believe criminalising cartels is critical to strengthening enforcement.

While economic experiments are a useful tool in proving intuitive propositions they are limited in scope, having to work with only existing policies, and observed cases. Given different localities, product markets or industries, and political and cultural differences in those localities, designing a leniency programme to suit all such complex factors is not feasible. Leniency policies will have a positive effect on cartel deterrence only if they reduce collusive activities by firms. If detection is improbable, and colluders wish to remain silent despite leniency because collusion is more profitable, then the enforcement authorities' dependence on the leniency policy to break up the cartel fails.

It can be safely concluded therefore, that the enforcement authorities could maximise detection and deterrence by creating an environment of high risk of detection, and prosecution.

The next chapter will examine the Penalty Guidance which helps the UK's principal enforcement authority, the OFT/CMA, in setting fines in competition investigation decisions.

CHAPTER 4

The OFT/CMA Penalty Guidance

4.1 Introduction

The procedural measures in the UK enforcement system, dealing with penalties in particular, after a finding of anticompetitive behaviour are explored in this chapter, as this helps better understand the decisions taken by the former OFT in the cases set out in chapter 5. The Penalty Guidance (Guidance) is fashioned according to the guidelines adopted by the Commission itself in setting fines for cartel participants on conviction. The Guidance has come up for much criticism by defendants and the CAT alike on a number of occasions, leading to several revisions of it. The Guidance is divided into two parts, one dealing with calculating the penalty, and the other with lenient treatment. Nevertheless, the Guidance comes into play when setting a fine whether leniency is granted or not.

4.1.1 Overview of the Penalty Guidance²⁹⁴

Under s 38 of CA 98, the Director of the OFT/CMA has to publish, after consultation with the relevant persons and with the approval of the Secretary of State, a Guidance as to the appropriate amount of a penalty, and the OFT must have regard to the Guidance on Penalties for the time being in force when setting the amount of a penalty. This is so, as under s 38(2) of CA 98, the OFT/CMA may alter the Guidance at any time. Indeed, the OFT has revised its Guidance several times, 'The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000' and the revised 'Guidance as to the

²⁹⁴ OFT423 Guidance is still called OFT's Guidance but applies to the current CMA also. For convenience, the reference hereafter will be to the OFT particularly because the body of cases that follow were decided by the OFT.

Appropriate Amount of a Penalty, OFT 423, December 2004' have been applied consecutively, to the OFT cases discussed in Chapter 5 of this research.²⁹⁵

The latest guidance, 'OFT's guidance as to the appropriate amount of a penalty, OFT423, September 2012' applies a new six step procedure as opposed to the five step Guidance of 2000 and 2004. The '2012 Guidance' has amended the starting point for penalties to a maximum of 30 per cent of the relevant turnover, clarifies the relevant turnover to be used, revises the methodology for reflecting the duration, and introduces a new aggravating factor for persistent and repeated delays to the OFT's investigation by the defendants. With regard to the leniency policy, the new Guidance provides for settlement discounts, and reductions for financial hardship. The Guidance clarifies its leniency policy in some respects, and has made some small amendments. However, there is no provision to impose a penalty equivalent to the harm caused, or to enable the calculation of the harm.

The 2012 Guidance came into operation after the OFT decisions under the purview of this thesis, and as such, those decisions were governed by the earlier, 2002 or 2004 Guidance in force at the time, as the case may be.

4.1.2 Penalty and Lenient Treatment

In granting a percentage of leniency to those who cooperate with the investigation, OFT must first calculate the likely penalty each colluder will have to pay. The OFT's policy objectives of the Guidance are stated to be twofold: i) imposing penalties on infringing undertakings to reflect the seriousness of those infringements, and ii) deterrence for both the infringing undertakings, and other undertakings that may be considering engaging in anticompetitive activities.

Once the OFT has found that an undertaking has breached the Chapter I prohibition, s 36 of CA 98 provides that the OFT may require the undertaking concerned to pay a penalty to the OFT in respect of that breach. An undertaking comprises those legal bodies forming a single economic entity with the person found to have breached the Chapter I prohibition.

²⁹⁵ Following criticism by the CAT, and also to bring the appropriate penalty in line with the Commission, and several other competition authorities such as in France, Germany and Spain, the OFT started a consultation prior to the changes brought into the OFT 423 Penalty Guidance, September 2012.

4.1.3 Legality of Penalties

The principle of legality in EU law requires that where an EU rule imposes or permits the imposition of penalties, that rule must be clear and precise, so that the persons concerned may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.²⁹⁶ The principle applies not only to provisions of a criminal nature but also to specific administrative instruments, as for example, in the enforcement of EU competition law, whereby such 'administrative penalties' may be imposed.²⁹⁷ The Commission's previous decision-making practice is not formally binding on the Commission when it determines the amount of a fine.²⁹⁸ However, in setting such 'administrative penalties' pursuant to Regulation 1/2003, the Commission is bound by the general principles of law, particularly the principle of equal treatment, in any determination as to the criteria and the method of calculation to be used. With a view to transparency and to increase legal certainty for the undertakings concerned, the Commission has also published guidelines setting out the calculation method which it has to follow in determining the penalties in a given case.²⁹⁹

While the OFT/CMA (or any other NCA) does not have to follow the Commission's own guidelines in calculating the penalties, the OFT has formulated its guidelines based on the same principle of equal treatment, now similarly adopted by the CMA.

Further, in any decision imposing a fine, the Commission is obliged in accordance with Article 296(2) TFEU, to state the reasons for its decision, particularly with regard to the amount of fine and method of calculation. The statement of reasons must be clear and unequivocal, so that those concerned can know the justification for the measure taken in order to decide whether it would be expedient to refer the matter to the CJEU and allow that Court to exercise its power of judicial review.³⁰⁰

The OFT has recognised the importance of setting the penalties proportionately and not excessively. No penalty which the OFT may fix exceed the maximum 10 per cent of the worldwide turnover of the undertaking, calculated in accordance with the provisions of CA

²⁹⁶ Case 169/80 *Gondrand*, [1981] ECR 1931, [17]; Case -143/93 *Van Es Douane Agenten*, [1996] ECR I-431, [27].

²⁹⁷ Case 137/85 *Maizena v Commission* [1987] ECR 4587, [14]-[15].

²⁹⁸ See Case T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705; Case T-203/01 *Michelin v Commission* [2003] ECR II-4071.

²⁹⁹ Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty fines [1998] OJ C 9 14/98, pp 3-5.

³⁰⁰ See Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3435; See also Case C-367/95 P *Commission v Sytraval and another* [1998] ECR I-1718.

98.³⁰¹ Although the maximum percentage has since been revised,³⁰² the penalty of 10 per cent maximum of the turnover applies to all the OFT cases discussed in this thesis.

The Commission further refined and elaborated its fining policy in its 2006 Fining Guidelines.³⁰³ In the UK therefore, the OFT has also issued various circulars giving guidance on its approach to the enforcement of competition law within the UK, including Guidance as to the appropriate amount of a penalty under discussion here (OFT 423).

In accordance with s 38(8) of CA 98, the OFT must have regard to the Guidance on Penalties under s 38(1) of CA 98, for the time being in force when setting the amount of a penalty.

4.1.4 Steps to be Followed in Calculating a Penalty – Step 1

The penalties Guidance sets out the approach to calculating a financial penalty imposed under s 36 of the CA 98. According to the Guidance, there are five steps (now extended to six, under OFT 423, Guidance 2012), to be followed in determining the amount of a penalty.

Under Part 2.1 of the penalties Guidance, a financial penalty imposed by the OFT under s 36 of CA 98 will be calculated following a five step approach. Step 1 is the calculation of the starting point, by applying a percentage determined by the seriousness of the infringement to the 'relevant turnover' of the undertaking, in the relevant product market and the relevant geographic market affected by the infringement in the last financial year. According to the Penalties Order, the last financial year is the business year preceding the date when the infringement ended.

4.1.5 Percentage Rate of Turnover

The actual percentage rate which is applied to the relevant turnover depends upon a number of factors relating to the nature of the infringement. The more serious the infringement, the higher the likely percentage rate. The factors that determine the assessment include the nature of the product, the structure of the market, the market shares of the undertakings involved, entry conditions, and the effect on competitors and third parties. An important consideration will also be the damage caused to consumers, whether directly or indirectly.³⁰⁴

³⁰¹ Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

³⁰² OFT penalty guidance of 2012 has raised the maximum percentage rate to 30; See OFT 423: OFT's guidance as to the appropriate amount of a penalty, September 2012.

³⁰³ Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C 210/2; See Commission Press release IP/06/857, 28.06.2006.

³⁰⁴ In the majority of the OFT cases, the resulting damage to consumers could not in effect be assessed.

An assessment of the appropriate starting point for each undertaking involved will be carried out, in order to take account of the real impact of the infringing activity of each undertaking on competition.³⁰⁵

4.2 Duration and Other Factors

Step 2 is an adjustment for duration, according to which the figure arrived at may be multiplied by not more than the number of years of the infringement, in cases where the infringement has lasted more than 1 year. (Part years may be taken as full or quarter year).

Step 3 is an upwards adjustment for other factors, in particular to ensure that the penalty has the appropriate deterrent effect. The deterrent effect is not only intended for the firm under investigation but also for those who may intend to engage in anticompetitive behaviour in the future.

Step 4 is an adjustment for further aggravating or mitigating factors. It sets out aggravating factors which include: persistent and repeated unreasonable behaviour that delays the investigation; role of the undertaking as a leader in or an instigator of the infringement; involvement of directors or senior management; retaliatory or other coercive measures taken with the aim of ensuring other undertakings continue with the infringement; continuing the infringement after the start of an investigation, and; repeated infringements by the same undertaking or other undertakings in the same group.³⁰⁶ Mitigating factors under Step 4 include: where the undertaking is acting under severe duress or pressure; genuine uncertainty as to whether the agreement or conduct constituted an infringement, and; adequate steps have been taken to ensure compliance with Article 101 (and 102) and the Chapter I (and Chapter II) prohibitions.³⁰⁷

Step 5 is a cross-check to ensure that the maximum penalty permitted under the Penalties Order is not exceeded, and to avoid double jeopardy. (The new Step 5, 'adjustment for specific deterrence and proportionality' introduced into OFT 423, September 2012, does not come into play in the OFT cases discussed in this thesis, as will not, the 30 per cent penalty increase in that Guidance (para 2.11).

³⁰⁵ Under s 60 of CA 98, the OFT is not required to calculate penalties in the same way as those imposed by the Commission under Regulation 1/2003 for infringements of Articles 101 and 102. It only requires decisions to have consistency in the interpretation of the substantive EC and UK competition law provisions concerned.

³⁰⁶ Paragraph 2.14 of the Guidance sets out eight aggravating factors, only six are mentioned above.

³⁰⁷ Paragraph 2.15 of the Guidance sets out five mitigating factors, of which only three are mentioned above. The last (the third) mentioned mitigating factor above relating to compliance, is not taken as an aggravating factor by the OFT in increasing the penalty unless there are exceptional cases. Such exceptional circumstances could include situations where compliance activities are used to conceal or facilitate an infringement, or to mislead the OFT during its investigation.

4.2.1 Avoidance of Double Jeopardy

Under s 38(9) CA 98 if a penalty or fine has been imposed by the Commission or by a court or another body in another Member State in respect of an agreement or conduct, the OFT/CMA must take that penalty or fine into account when setting the amount of a penalty in relation to that agreement or conduct. This is to ensure that, where an anticompetitive agreement or conduct is subject to proceedings resulting in a penalty or fine in another Member State, an undertaking will not be penalised again in the UK for the same anticompetitive effects.³⁰⁸ The Court of Appeal in its judgment in the *Replica Kit* and *Toys* cases,³⁰⁹ stated that s 38(8) of the CA 98 does not bind the OFT to follow the Penalty Guidance in all respects in every case, but that in accordance with general principle, the OFT must give reasons for any significant departure from the Penalty Guidance.

4.2.2 Penalty Must Correspond to Relevant Financial Year

The CJEU has held, specifically within the context of EU competition law enforcement, that it is a fundamental right not to have penalties applied which are more punitive than those which might reasonably have been expected to have been applied at the time of the offending conduct.³¹⁰ Hence at Step 1, the OFT adopted a specific year under s 36 (8) CA 98, for calculating the relevant turnover of an undertaking, i.e. the financial year prior to the infringement.³¹¹ However this (the 'Penalties Order') has been amended subsequently by the substitution of a new Article 3, to the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it.³¹² The object of the amendment was to bring the Penalties Order in line with EU regulation.³¹³ However, this change met with criticism by the CAT in the *Constructions* cases.³¹⁴

³⁰⁸ *Gransden & Co Ltd and another v Secretary of State for the Environment and another* (1985) 54 P. & C.R 86, [94], Woolf J.

³⁰⁹ See Joined cases *Argos Ltd and Littlewoods Ltd v Office of Fair Trading*, *JJB Sports v Office of Fair Trading*, [2006] EWCA Civ 1318, [161] (*Replica Kit & Toys* cases).

³¹⁰ Joined Cases C-189/02 P etc *Dansk A/S Rorindustri and others v Commission*, [2005] ECR I-5425.

³¹¹ CA 98 (Determination of Turnover for Penalties) Order 2000, SI 2000/309, ("the Penalties Order")

³¹² CA 98 (Determination of Turnover for Penalties) (Amendment) Order, SI 2004/1259.

³¹³ Council Regulation (EC) No. 1/2003, OJ 2003 L1/1.

³¹⁴ *Kier Group and Others v Office of Fair Trading* [2011] CAT 3, para 137.

In applying the steps to individual undertakings in multi-party cases, the OFT has to observe the principle of equal treatment as articulated by the Court of First Instance (now the General Court), in *Tokai Carbon*.³¹⁵

4.2.3 Relevant Market Essential in Ascertaining Turnover

The OFT has no obligation to define the relevant market in price-fixing agreements as these agreements by their very nature have the object of prevention, restriction and distortion of competition.³¹⁶ However, market definition is the first step in the process of assessing the penalties (OFT's Guidance, para 2.3), as per the Commission Notice of 1997.³¹⁷ which means the OFT addresses the definition of both the product market and the geographic market, in order to set the percentage of penalty on the relevant turnover.

In *Continental Can*³¹⁸ it was stated that the definition of the 'relevant market' was a key step and of essential significance for judicial understanding of the concept, since the characteristics of the products in question are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products.

A typical increase in demand can be illustrated in a simple supply and demand diagram³¹⁹ as shown in Figure 3 below:

³¹⁵ Case T-236/01 *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1 181 [219]; See *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, [177].

³¹⁶ Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, [230].

³¹⁷ Market definition – 'is to identify in a systematic way the competitive constraints that the undertakings involved face.' See Commission Notice on the Definition of the Relevant Market for the purpose of Community Competition Law (1997) OJ C 372/5.

³¹⁸ Case 6/72 *Continental Can v Commission* [1973] ECR 215, (Summary), [14].

³¹⁹ See 'Market Structure – Economics' *Wikipedia, the free encyclopedia*; See also MICROeconomics 19 Minute Review < <https://www.youtube.com/watch?v=JRIREpsr348> > last accessed 06.05.2017; Richard V Eastin and Gary L Arbogast, 'Demand and Supply Analysis: Introduction' *CFA Institute*, Exhibits 16 and 17 at 33-34.

Supply and Demand curve

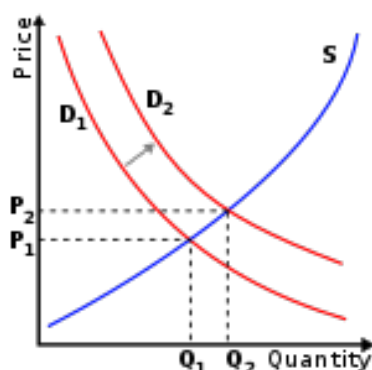


Figure 3

The price of a commodity is determined by the interaction of supply and demand in a market.

Identifying the 'relevant market' can be a contentious issue with defendants, as has been seen in some of the OFT cases in Chapter 5 of this thesis.³²⁰ The defendants, understandably, argue for the relevant market to be narrower or wider perhaps in an effort to show their activities have not had any significant damaging effect. To overcome such resistance, markets need to be regulated to be open and transparent, which will enable authorities to spot risk of concentration speedily.

4.2.4 Relevant Product Market and SSNIP

The relevant product market is to be defined by reference to the facts in any given case. The question to ask is whether the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market.³²¹ In order to deal with the problem of subjectivity (of the product), both EU and UK have adopted (as used by US DoJ) what is known as the 'hypothetical monopolist' test as a conceptual framework to try and understand what consumers in the market will do when there is a 'Small but Significant Non-transitory Increase in Price' referred to as the SSNIP test.³²² In defining the relevant market, the OFT

³²⁰ See OFT Decision No. CA98/01/2011, (Sec 5.15); OFT Decision No. CA98/01/2006, (Sec. 5.19); OFT Decision CA98/04/2005, (sec 5.23).

³²¹ *Aberdeen Journals v Director General of Fair Trading* [2002] CAT 4, paras 96-7.

³²² The SSNIP test defines the relevant market by determining whether a given increase in product prices would be profitable for a monopolist in that market.

adopts the hypothetical monopolist test,³²³ by establishing the closest substitutes to the product in question.

4.3. Relevant Geographic Market

The relevant geographic market is the territory where all traders in question operate in a sufficiently homogeneous condition, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas. Citing the two *Tetra Pak*³²⁴ cases, the Court of First Instance said in *British Airways* that the geographic market ‘...may be defined as the territory in which all traders operate in the same or sufficiently homogeneous conditions of competition in so far as concerns specifically the relevant products or services, without it being necessary for those conditions to be perfectly homogeneous ...’³²⁵

It is necessary to define the market only where it is impossible to determine whether an agreement is liable to affect trade in the UK without such a definition, and that its object is the prevention, restriction or distortion of competition. Both the product and geographic ‘relevant markets’ are complex economic issues that may involve many possible relevant markets for the purposes of administering justice.

4.3.1 Cooperation with Other Jurisdictions via ECN

The OFT/CMA cooperates with the Commission, and with the NCAs in other member states through the ECN. Confidential information can be exchanged relating to investigations in different member states, with the consent of the investigating member state or member states concerned via the ECN. Within the ECN, the European Model Leniency Programme has been set up to provide a harmonising effect on all European leniency programmes, and it is designed to ensure that potential applicants are not discouraged from applying as a result of discrepancies between the existing leniency programmes within the ECN. The English courts have shown a readiness to take a wide view in relation to accepting jurisdiction. There have been a number of cases in which an English domiciled subsidiary of a Commission cartel

³²³ OFT, OFT403, Market Definition: Understanding Competition Law, December 2004, para 2.5.

³²⁴ Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, [91]; C-333/94 P *Tetra Pak v Commission (Tetra Pak II)* [1996] ECR I-5951).

³²⁵ *British Airways v Commission* [2004] 4 CMLR 1008, [108]; Mario Monti, ‘Market definition as a cornerstone of EU Competition Policy’ Speech at Workshop on market definition - Helsinki Fair Centre, Helsinki, 5 October 2001 (SPEECH/01/439), p 6.

infringement Decision was used as an anchor defendant in English courts, for the purpose of asserting jurisdiction over non-English domiciled addressees of that infringement decision.³²⁶ In addition, the UK is party to mutual assistance arrangements relating to competition law enforcement with a number of non-European countries including the US, Australia, Canada, China and New Zealand. The OFT will not pass on information supplied by leniency applications to an overseas agency without the consent of the provider except in one situation, i.e. that such information may be disclosed within the ECN in accordance with the provisions and safeguards set out in the Commission's Network Notice.³²⁷

Chapter I, CA 98 can apply to agreements between undertakings located outside the UK if they may have an impact on competition within the UK. It can apply wherever the agreement, decision or practice is, or is intended to be implemented in the UK.

4.3.2 Small Agreements

S 39 of CA 98 provides that a person is immune from the effect of s 36 if he is party to a 'small agreement' and, that agreement is not a price-fixing agreement. As such provisions applicable to s 39 of CA 98, do not apply to infringements of Chapter I prohibitions.³²⁸ 'Small agreements' are agreements between undertakings whose combined turnover for the business year ending in the year preceding the one in which the infringement occurred does not exceed £20 million. However, this rule does not apply in the case of hard core cartels, as has been the stance of the Commission which revised the De Minimis Notice in 2014,³²⁹ after a consultation following the CJEU judgement in *Expedia*,³³⁰ that agreements containing one or more "by object" or hard core restrictions cannot benefit from the safe harbour of the De Minimis Notice.³³¹

4.3.3 Intentional or Negligent Infringement pre- ERRa

Prior to ERRa 13, the requirement under s 36(3) CA 98 was that the OFT may impose a penalty only if it is satisfied that the infringement had been committed intentionally or negligently. Nevertheless, the OFT is not obliged to specify whether it considers the

³²⁶ *KME Yorkshire v Toshiba Carrier* [2012] EWCA Civ 1990, [20]-[21].

³²⁷ Commission Notice on cooperation within the Network of Competition Authorities, OJ C101/04, paras 40 and 41; OFT publication 'Application for leniency and no-action in cartel cases' July 2013, para 7.41.

³²⁸ Small Agreements and Conduct of Minor Significance Regulation 2000 (SI 2000/262).

³²⁹ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) {C(2014) 4136 final}

³³⁰ See Case C-226/11 *Expedia v Autorité de la concurrence* [2012] ECR 795.

³³¹ Commission Staff Working Document: Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice; Communication from the Commission - Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), {C(2014) 4136 final}, OJ C 291/01, 30 August 2014; See MEMO/14/440, and Commission Press Release 25/06/2014.

infringement to be intentional or merely negligent, as observed by the CAT in *Napp Pharmaceutical*.³³² The requirement of 'dishonesty' is no longer in force under the new ERA 13, but the OFT cases discussed in this thesis fall within that category as they have all been concluded prior to the new Act.

4.4 OFT/CMA's Three Categories of Leniency

The Penalty Guidance also sets out the basic requirements for the grant of lenient treatment by the OFT under its leniency programme. The aim of the leniency programme is to encourage undertakings to come forward with information relating to any cartel activity in which they are involved. Therefore, the Guidance is effectively divided into two parts, namely; 'Steps for determining the level of penalty' and 'Lenient treatment for undertakings coming forward with information'.

Part 3 of the penalty Guidance contains a number of separate, and self-standing provisions which govern the circumstances in which the OFT may grant leniency to undertakings that come forward and provide information about cartels under Type A, Type B or Type C.

Type A is for first applicants where there is no pre-existing investigation, and who supply sufficient evidence for the OFT to carry forward an investigation. There are five conditions that such an applicant must comply with, namely, accept participation of the cartel, provide OFT with all relevant evidence, maintain complete cooperation throughout the investigation, stop the wrongful activity immediately (or as directed by the OFT) and the applicant should not have coerced another party to take part in the cartel activity. Type B is also for a first applicant who applies where there is a pre-existing investigation but the application is made prior to the statement of objections is sent out to them, and the applicant's evidence has significant added value to the investigation. The third, Type C is available to a later applicant (or a coercer) who applies before the statement of objections, and must comply with four of the above conditions (except being a coercer) that apply to a first applicant under Type A and Type B.³³³

While a Type A applicant is granted full immunity from financial penalties, blanket immunity from criminal prosecution and protection from disqualification proceedings, Type B applicant may also obtain similar leniency but that will be at the OFT's discretion. Type C applicant will get discretionary leniency with a reduction of fines up to 50% and discretionary immunity from

³³² *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paras 455 and 457; *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11, paras 484-5.

³³³ *Ibid.*

prosecution for specific individuals, and protection from director disqualification if corporate leniency reduction is granted.³³⁴

4.4.1 Marker System for Leniency Applicants

A marker system is also in place for those who are seeking to apply but are not sure if they would be eligible. Enquiries can be made (usually by a prospective applicant's lawyer) to the OFT/CMA, even giving a hypothetical scenario in order to ascertain the possibility of gaining leniency, without having to disclose the names and addresses of the actual party involved.

Once the availability of leniency is confirmed, names can be disclosed and a marker is given so that the applicant gains time for preparing, if and until an investigation begins. This secures a first applicant's place in the line of applicants.

4.4.2 Leniency Plus

The OFT also provides Leniency Plus for applicants who disclose evidence about other separate cartel activity not related to the ongoing investigation which, if it fell within Type A or Type B would enable them to obtain a further reduction of the penalty on the first investigation. Whether leniency is granted or not, the OFT calculates the amount of fine that each perpetrator of the antitrust breach should be ordered to pay, according to a set guideline.

4.4.3 Reasons for Granting Leniency

The OFT states in its Guidance that it is in the interest of the economy of the UK and the European Union more generally, to have a policy of granting lenient treatment to undertakings which inform the OFT of cartel activities, and cooperate with any ensuing investigation. It is the secret nature of cartel activity which makes it difficult to detect them, and as such the OFT believes this policy to be justified. Further, the interests of customers and consumers in ensuring that such activities are detected and prohibited outweigh the policy objectives of imposing financial penalties on colluding undertakings.³³⁵

The procedure for applying for leniency is given in a separate Leniency Guidance. The leniency guidance was revised in 2008 to clarify and expand the policy with a view to giving

³³⁴ Ibid.

³³⁵ Paragraph 3.3 of the Penalty Guidance, OFT423.

maximum predictability and transparency for leniency applicants.³³⁶ The revision offers additional explanation on issues such as: the need for ‘genuine intention to confess’ and of ‘continuous and complete cooperation’; criteria for discounts for those who are not the first to apply; the requirements for criminal immunity, and when the OFT will advise individuals that they are not at risk of criminal prosecution; the timing for entering into agreements with the OFT, and; the use to which leniency information may be put. Confidentiality is afforded to leniency applicants as set out in Part 3.24.

4.4.4 The CAT’s Dissatisfaction with the Guidance

Questions have been raised by the CAT both with regard to the OFT’s penalty Guidance calculations and the relevant financial year in some of the OFT decisions. In the *Constructions Industry*³³⁷ cases, the CAT was of the opinion that the relevant financial year should be the business year prior to the ending of an infringement by the undertaking concerned. The OFT had, in its decisions in those cases taken the financial year to be the one prior to the OFT’s Decision, following a change in the Penalties Order in 2004. The CAT described the calculation of the penalty as inconsistent with the 2004 Guidance for penalties, and mechanistically arrived at in those cases, by using a Minimum Deterrent Threshold (MDT).³³⁸ The CAT was not bound to follow the OFT penalty guidance,³³⁹ although the OFT did. Interestingly, the CAT does not explain itself how it arrives at the conclusions relating to the amount of penalties or reduction of penalties imposed in the appeal cases.

The CAT retains jurisdiction under Schedule 8, paragraph 3(2) of CA 98 to fix the penalty. In its decision in *Napp Pharmaceutical*,³⁴⁰ however, the CAT did take into account the OFT Guidance when reaching its own conclusions as to what the penalty should be. In *JJB Sports* and *Allsports* appeals, the CAT held that the OFT must have regard to the Guidance which imports a stronger obligation than merely to take it into account.³⁴¹ Nevertheless, the OFT retains a margin of appreciation, as to its interpretation and application of the Guidance. Under the new reforms, however, the CAT must have regard to the Guidance when deciding cases that will come before it, thereby getting its just deserts!

³³⁶ OFT 803, Leniency and no action: OFT’s guidance note on the handling of applications, December 2008; See also OFT1495, Applications for leniency and no-action in cartel cases: OFT’s detailed guidance on the principles and process, July 2013.

³³⁷ *Barrett Estate Services and Others v Office of Fair Trading* [2011] CAT 9, paras 19-24.

³³⁸ *Ibid*, para 40. (CAT also heavily criticised the use of MDT in the calculation of the penalty as well).

³³⁹ This position has now changed under ERRA 2013 and, the CAT must have regard to the Penalty Guidance under s 44(3).

³⁴⁰ *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, para 500; [2002] All ER (D) 54 (Jan).

³⁴¹ *JJB Sports PLC v Office of Fair Trading and Allsports Limited v Office of Fair Trading* [2004] CAT 17, para 101.

Whatever the merits and the demerits of the penalties Guidance, it is the only guidance the OFT has at its disposal to do the necessary calculations. Apart from the requirement to abide by the five step rules, and the associated rules in the Guidance, there is no way for anyone to ascertain how the penalty amounts are arrived at when leniency is granted to cooperating parties, as these amounts together with relevant turnovers are redacted from the published version of the decision, in a number of the OFT cases. Percentage rates made at each of the steps in the Guidance for penalties, except for step 2 for duration, are in reality arbitrary (within the permitted 10 percent), and therefore at the discretion of the OFT, depending on the circumstances of each case. The guidance does not differentiate between violations such as object and effect based infringements. Moreover, it does not provide for compensation or separation of retribution and deterrence goals. Perhaps there should be a rethink about the Penalty Guidance with a view to revise it or adopt a newer and better mechanism which is more transparent and easy for a Tribunal to accept without the problems that the CAT appears to have encountered.

4.4.5 Conclusion

In the UK, in addition to various other rules governing the OFT/CMA, the penalty Guidance plays an important role once the OFT/CMA makes a finding of infringement by a company. The Guidance, as the term indicates, only serves the OFT/CMA to keep within a certain margin in calculating the penalty it intends to impose on the infringing party. There is a certain degree of discretion which the OFT/CMA enjoys in setting the percentages at each of the Steps 1, 3, and 4 in particular, depending on the seriousness with which it regards the infringement in question. This very discretion, however carefully applied, has led to some serious controversy raised both by the defendants at the receiving end of it, and also by the CAT in several of the appeals that have been brought before it by those defendants.³⁴²

This is a particular drawback for an enforcement authority to endure, particularly given the unpopular press coverage the OFT has received whenever the CAT has reversed or reduced the fines imposed by the OFT on high profile cases, sometimes with severe criticism levelled against the OFT's calculation process.³⁴³ More importantly, the case decisions suffer after having gone through lengthy and costly investigations, resulting in either the decision being quashed or penalties reduced drastically. There is also no method of calculating the harm caused by the cartel activities under investigation or an attempt to set the fine proportionate to the harm caused which may have a better deterrent effect. Perhaps, a method by which

³⁴² OFT Decision No. CA98/02/2009, *Bid rigging in the construction industry in England*, (Case CE/4327-04) 21 September 2009.

³⁴³ Graham Ruddick, 'OFT's construction industry fines cut by 89pc on appeal' *The Telegraph*, 12 March 2011.

penalties can be calculated by a viable economic calculation, as opposed to the damage caused, should be developed. The assessment of damage is a difficult area in large scale cartel activities, and penalties imposed according to the Guidance may not be sufficient. By using stochastic lemmas, a method that can be used consistently in damage assessment could greatly improve the imposition of optimal fines.

The next chapter will focus on the UK's published decisions of Chapter I cases by its principal enforcement authority, the then OFT (now CMA), over a period of 12 years detailing the application of leniency in those cases with the object of examining the efficacy of leniency in enforcement.

CHAPTER 5

OFT's Leniency Programme in Practice – Chapter I Cases

5.1 Introduction

This chapter introduces the Chapter I, CA 98 cases investigated and published by the OFT between 2001 and April 2012. Under s 188(1) of the EA 02 as amended by the ERRA 2013, criminal cartel offence constitutes certain prohibited cartel arrangements namely, price fixing, market sharing, bid-rigging, and limiting output. The maximum penalty on conviction is five years' imprisonment and/or an unlimited fine under the provisions of EA 02, as these offences are considered to be the most serious of anticompetitive breaches. However, the cases under this chapter are administrative investigations, with no parallel criminal prosecutions that the OFT/CMA is empowered to effect, except in one, *Airline Fuel Surcharge* (sec 5.11), which failed.

Most of the cases dealt with in this chapter involve price fixing, and in the construction sector cases the offences concern bid rigging or cover pricing in the main, involving a large number of construction companies. A few other cases of market sharing, non-compete agreements, and restrictive trade practices are also found. In some of the cases, the same parties were found to have been involved in several offences. Two of the cases originated as applications for exemption, which do not involve leniency, however one of them turned into a full investigation due to a subsequent complaint by an interested party. Both cases led to appeals before the CAT.

The purpose of revisiting these OFT decisions is to examine whether the leniency programme has been the key to discovering the infringements pertaining to these cases. As such, the cases set out in this chapter form the core of this thesis for verification of the statements made by enforcement authorities in the UK, that the leniency programme plays an essential part in the discovery of anticompetitive behaviour by companies.³⁴⁴ The question of whether leniency serves the purpose it says is important for two reasons. First, the infringing companies can

³⁴⁴ Ali Nickpay, 'UK cartel enforcement – past, present, future', Speech to the Law Society Anti-Trust Section, 11 December 2012, pp 6 and 31; BIS, A competition regime for growth: A consultation on options for reform, 2011.

keep the profits of their illegal activities on leniency being granted, and in addition they do not have to pay any costs towards the investigation proceedings. Second, leniency comes with the proviso of nondisclosure of the leniency documents other than with the consent of the party/parties providing them. This aspect of leniency can be a hindrance to private actions by victims, who are thereby unable to access vital evidence that may contain within those documents, in order to prove their claims. It is also noteworthy that those companies granted immunity are protected from criminal prosecution.

In the UK, the enforcement record of the principal antitrust authority, the OFT/CMA, has been the subject of much criticism by the National Audit Office over the years.³⁴⁵ The main reason for such criticism has been its poor record of cases, along with low detection rates and investigations, and also the prolonged length of time taken to arrive at final decisions by the OFT. UK being one of the largest economies in the EU, it could be expected to have a high level of enforcement, but the OFT notified the least number of Decisions to the Commission out of eleven EU countries between the period of 2004 and 2011.³⁴⁶ During the same period, the UK opened only 56 new investigations, fewer than did Hungary, despite the fact that the UK's economy was more than ten times bigger than that of Hungary,³⁴⁷ and the UK's former Department for Business, Innovation and Skills (BIS) stating that it has inherited a 'world class' competition regime.³⁴⁸ This could mean that the UK has a far better competitive economy than elsewhere in Europe. However, Consumer Association, 'Which?' may disagree, and the plethora of financial scandals by banks that are uncovering since the 2008 financial crisis tell a different story.

The OFT, on its part, has stated it selects a small number of more high profile cases, in order to save up resources, and to make the public and the companies more aware of the

³⁴⁵ NAO, 'UK Competition Authorities: The UK competition regime' (HC 737), 5 February 2016, para 21; NAO – Review of the UK's Competition Landscape, 2010, para 10; NAO, 'The Office of Fair Trading – Progress Report on Maintaining Competition in Markets' (HC 127), 5 March 2009; NAO, 'The Office of Fair Trading: Maintaining competition in markets' (HC 593), 17 November 2005; 'NAO Report 2005'- NAO report criticised OFT for ineffective case management, an over-reliance on complaints and a failure to prioritise cases. The NAO report raised concerns that OFT investigations were taking too long thereby using up valuable resources, and lacked transparency. But a later review published on 5 March 2009, NAO praised OFT for making progress and suggested actions that the OFT could take to make further improvements, (Progress report on maintaining competition in markets, 5 March 2009).

³⁴⁶ BIS, **Ref: BIS/11/657**, A Competition Regime for Growth: A Consultation on Options for Reform, March 2011, Table 5.1 at 47.

³⁴⁷ Office for National Statistics, 'UK Perspectives 2016: The UK in a European context'; See also BIS, **Ref: BIS/11/657**, (n 346), paras 1.4 and 1.5, the BIS states that the UK Competition regime is acclaimed internationally, gaining top awards and placed 3rd in the best 5 agencies in the world, and that the UK Competition regime is 'world class.'

³⁴⁸ See n 346, para 1.5; See also BIS, **BIS/12/644**, A competition regime for growth: a consultation on options for reform – final impact assessment, para 10 at 12.

Competition rules. In the *Construction industry*³⁴⁹ cases alone, the OFT detected some 1,000 companies involved in anticompetitive behaviour but due to the sheer volume of work involved, it selected only some, where the evidence was more likely to be forthcoming

The government's consultation paper for reform pre ERRA 13, records Chapter 1, CA 98 infringement decisions between 2000 and 2010, numbering 21, excluding settlements.³⁵⁰ In an updated Table are recorded 29 formal infringement decisions (comprising of both Chapters I and II), including two decisions made in April 2012.³⁵¹ Altogether, there are 24 cases involving Chapter I infringements, and the companies concerned come from a number of different sectors including private schools. Of these, 19 of the defendant companies were fined on conviction, (with no public disclosure of the fine imposed in one case). In almost all of these cases either one or more of the parties were granted leniency in varying degrees, and a pattern emerges that appears to be applied in all cases irrespective of the type of anticompetitive breach. The reason for this pattern seems to be the Penalty Guidance which the OFT/CMA has to follow. The procedure in calculating the penalties is discussed in some of the cases (restricted to the first 4 cases in the main), as these calculations have been redacted in some of the other cases, and no penalties were imposed on some others.

5.2 Arriva plc and First Group plc - Market Sharing Agreement

The first cartel case investigated by the OFT in July 2000, since CA 98 came into force, started due to an anonymous letter of complaint to the OFT, regarding an alleged agreement to swap bus routes (market sharing agreement) by two bus companies operating in the Leeds area, namely Arriva plc and FirstGroup plc.³⁵² For the purpose of the OFT investigation, the product market was the supply of commercial local bus services, and the geographic market was the relevant bus routes.³⁵³ The two parties held 100 per cent market shares in the relevant geographic market.

Despite the senior managers of both companies having undergone compliance training and a compliance training programme in place for the staff, evidence came to light that directors

³⁴⁹ OFT Case CE 4327/04, No. CA98/02/2009, *Bid rigging in the construction industry in England*, para II.1534; See also *Kier Group and Others v Office of Fair Trading* [2011] CAT 3, para 103.

³⁵⁰ BIS, **Ref: BIS/11/657**, A Competition Regime for Growth: A Consultation on Options for Reform, March, 2011, Table 2 at 147.

³⁵¹ Cosmo Graham 'The Reform of UK Competition Policy' (2012) 8(3) *European Competition Journal* 539, pp 542-44.

³⁵² OFT Decision No. CA98/9/2002, *Market sharing by Arriva plc and FirstGroup plc*, (Case CP/1163-00), 30 January 2002.

³⁵³ *Ibid*, paras 38 and 40 respectively.

from both companies took part in a secret meeting in a hotel, to come up with the swapping agreement, followed by a second meeting. The parties had, therefore, entered into the agreement intentionally or negligently.

The OFT found the agreement had the object of prevention, restriction or distortion of competition in the UK, within the meaning of section 2(1) b of CA 98. The two parties had agreed to engage in market sharing or market dividing of the bus services in the Leeds area along the routes concerned. However, both companies benefited from the OFT's Leniency Programme, with FirstGroup's fine completely wiped off, and Arriva's penalty reduced by 36 per cent. Further, the parties were provided with confidentiality under section 56 of CA 98,³⁵⁴ and as a result certain redactions have been made in the published version of the case record.

At the start of the investigation, the DGFT (the Director General of Fair Trading)³⁵⁵ made an application to the High Court and the Court of Session for warrants under s 28 of CA 98 to enter the premises of the two companies, and made unannounced visits to seize relevant documents. The OFT also issued a Notice under section 26 of CA 98, in order to obtain specified documents from the specialist consultants in public transport. In addition, documents had to be obtained from the Traffic Commissioner of the relevant area. The two defendant companies made oral and written submissions in response to Rule 14 Notice. They both provided further information and clarification of the operation of the bus routes concerned in the investigation.

Both Arriva and FirstGroup were two arms of much bigger entities, Arriva's operations spreading across the UK and a number of EU countries, and FirstGroup was operating across the UK. The annual total turnover for Arriva was £1,534.3 million of which UK turnover was £1,355.9 million for the preceding year (ending March 1999). The total turnover for FirstGroup for the immediately preceding year (1999) was £1,480.3 million of which £1,470.4 million was generated in the UK. The total turnover in the following year (2000) for FirstGroup was £1,817.8 million, of which £1,548.7 million was UK turnover.

Hence, neither party could benefit from immunity from penalties for small agreements under s 39(1), CA 98, and in any case such immunity does not apply to a cartel offence which was the situation here. The maximum penalty that the OFT could impose under CA 98, at the time was

³⁵⁴ Read with s 237 of the Enterprise Act 2002.

³⁵⁵ Until 1 April 2003 the OFT's functions were carried out by the Director General of Fair Trading (DGFT), whose functions were transferred to the OFT on that date pursuant to s 2(1) Enterprise Act 2002. References to this Decision, including the OFT's leniency policy at the time were the responsibility of the DGFT, s 2(3) Enterprise Act 2002.

10 per cent of the turnover under section 36(8) of the CA 98).³⁵⁶ Both parties had turnovers of almost equal size, and both parties took part in the agreement willingly although Arriva was the instigator. Initially, as a starting point both parties were given a sizable penalty as a deterrent, and later adjusted in keeping with the OFT's penalty Guidance according to aggravating or mitigating factors which left FirstGroup with a bigger fine at the next step. However, the OFT took into consideration the fact that FirstGroup was the first to apply for leniency after the investigation started and provide evidence, hence granted 100 percent immunity to FirstGroup. Arriva approached OFT with a leniency application later, and complied with the conditions to the same extent as FirstGroup, but their penalty was reduced only to the extent of 36 per cent.

How did the defendants obtain leniency if the OFT had to go to great lengths to obtain the documents, and start the investigation before the defendants responded with their submissions and admitted their involvement? At what stage in the case did OFT grant leniency to the infringers? Taking the second question first, it appears that the two parties were Type B applicants for leniency (who apply after the investigation has started), the first to apply gaining total immunity, in this case FirstGroup, and Arriva being the second applicant, gaining a reduction in fines. In answering the first question, it appears granting leniency negates all other considerations.

The OFT's five step Guidance rules applied in the case show both parties' starting point set at 10 per cent.³⁵⁷ The actual percentage rate applied to the relevant turnover depends on the nature of the infringement. The more serious the infringement, the higher the percentage, and the OFT considered in the case that '...market sharing to be amongst the most serious infringements caught by the Act due to the significant harm it may inflict on the competitive process.'³⁵⁸ The actual amounts of penalty imposed at this first step are subject to excision in the case record. The second step has no losers as both parties had ended the infringement at the point of FirstGroup applying for leniency. The third step, where deterrence objective is applied to reflect the seriousness of the infringement, was weighed as equal since both parties participated equally and, consequently the penalty was increased, (the sum redacted from the record) the OFT merely stating that a sum over £500,000 between the two parties was

³⁵⁶ The OFT Penalty Guidance 423, 2000 was replaced in 2004, but applicable to Decisions made at the time.

³⁵⁷ OFT Decision No. CA98/9/200, *Arriva*, para 60.

³⁵⁸ *Ibid.*

imposed. The penalties were then adjusted according to paragraph 2.8 of the Guidance,³⁵⁹ so that after step 3, Arriva's penalty stood at £318,175 and that of FirstGroup at £529,852.

The OFT's approach to step 4 is interesting. Step 4 involves taking aggravating or mitigating factors into consideration in order to increase or decrease the penalty respectively. The OFT considered the taking part of senior executives (including divisional directors), of two major transport companies in a serious infringement to be an aggravating factor, and therefore the penalties were increased by 10 per cent. However, the OFT recognised from the evidence and copies of training manuals submitted that both parties had genuine compliance systems in place which were generally followed, and therefore, the OFT held that to be a mitigating factor and reduced the penalty by 10 per cent. This, despite the fact that participating executives and directors in the infringement had themselves undergone compliance training. It is incomprehensible that these two contradictory factors – training in compliance procedure, and acting against it to take part in a serious infringement – were reconciled in order to cancel out a penalty. If anything, they should have been taken as combined aggravating factors.

In paragraph 67 of the Decision (under the heading Mitigating Factors) the OFT also mentions that normally it is minded to give a reduction in penalty when a party has cooperated with an investigation (in this case both parties did). However as both Arriva and FirstGroup were granted leniency on the basis of agreeing to cooperate, no additional reductions were due. Thus after completing four of the calculation Steps, the OFT arrived at penalties for the two parties as £318,175 for Arriva and £529,852 for FirstGroup.

The final step, Step 5 was for adjustment to prevent maximum penalty being exceeded and to avoid double jeopardy. Here it was decided that the above penalties did not exceed 10 per cent of the applicable turnover of either party, 10 per cent of relevant turnover being the maximum amount of penalty allowed under section 36 of CA 98.

The story does not end here as the next stage comes under the heading of Leniency.³⁶⁰ As FirstGroup approached the OFT after it had started the investigation with a leniency application first, and provided information, FirstGroup were granted 100 per cent immunity, and thus their penalty was reduced to nil. Arriva made their leniency application second and leniency was granted to them on the same conditions as FirstGroup, but being the second to

³⁵⁹ The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000, ("the Guidance").

³⁶⁰ The DGFT's Guidance is divided into two parts, and provides for "steps for determining the level of penalty" and "lenient treatment for undertakings coming forward with information".

apply, their penalty was only reduced, and by 36 per cent. Arriva was therefore left with a penalty of £203,623 to be paid to the OFT.

It is not clear why Arriva was behind time in making its leniency application to the OFT, as this information is not available, nor would it be of any consequence (had it been made available to the OFT) because the regulations only require a party to apply first in order to obtain immunity. The rule is strict, whatever the circumstances are. The moral of the case is, the first past the post wins notwithstanding any foul play along the way. This feature in leniency will be played out again and again in the cases that follow, where leniency applications have been made. Even where no leniency applications were made, the OFT has readily given reductions in the penalty if parties cooperated with the investigation.

Under Step 4 of the OFT penalty guidance, involvement of directors and senior management is considered to be an aggravating factor. Therefore, the fact that senior managers (who were also directors) from both parties were involved in the infringement is a serious matter. It is even more serious when they had undergone compliance training, and had compliance programs in place for the staff as well in their respective companies. It also leaves a question mark over the readiness with which the OFT reduces penalties over claims by companies that they have put compliance programmes in place.³⁶¹

If the OFT were to take a stand on deterrence, this would have been a good opportunity if criminal proceedings were brought against the directors.³⁶² As the first cartel case since the CA 98 came into effect, the publicity generated by prosecuting, and may be disqualifying the directors, was an opportunity missed for both deterrence and making businesses and the general public more aware of Competition rules.

It is important to note here that neither party came forward with a leniency application until after the OFT started its investigation.

³⁶¹ The Commission on the other hand does not recognise such a claim as a mitigating factor, due to unreliability; See Commission brochure, "Compliance matters – What companies can do better to respect EU Competition rules."

³⁶² If not a criminal prosecution under EA 02, at least a Director Disqualification Order under s 9A of the Company Directors Disqualification Act 1986 could have been sought by the civil investigation. In this regard it is interesting that a senior official of the OFT claiming that the OFT's experience in civil cases over the years was that the conduct in question was not carried out at a sufficiently senior level. See Ali Nickpay, 'UK cartel enforcement – past, present, future' Speech to the Law Society Anti-Trust Section, 11 December 2012, p 32.

5.3 John Bruce (UK) Ltd, Fleet Parts Ltd and TTC - RPM Agreement

This cartel case has no leniency applicants. That fact did not prevent the OFT rewarding two of the parties with reductions in the penalties imposed on them. This case involved three parties, John Bruce (UK) Limited, Fleet Parts Limited and Truck and Trailer Components who had entered into resale price maintenance (RPM) agreements.³⁶³ One of the parties, Fleet Parts made a complaint to the OFT providing documents of the existence of a price-fixing cartel between these undertakings. The OFT sent Notices under section 26 of CA 98 to John Bruce and Fleet Parts requiring them to produce specific documents. The documents provided consisted of letters, e-mails, internal communications, memoranda distributed to sales staff marked 'private and confidential' and also policy evidence.

John Bruce was the supplier of imported slack adjusters (safety devices fitted to breaking systems of trucks, trailers and buses), and in the statement submitted to the OFT, admitted it had written to all its dealers to adopt a common pricing policy with special prices set up by John Bruce. Separately, by a letter to the OFT (dated 28 August 2001) John Bruce also admitted that it 'adopted a policy of giving distribution to any and all legitimate candidates in the market but asked them to maintain resale prices'. The OFT sent section 26 notices to the dealers and on the strength of their statements and evidence, selected Truck and Trailer (TTC) as the third party who acted on the agreement.

John Bruce's defence was an interesting one, quoting *Vervaecke*,³⁶⁴ the defendant argued 'even a "hard core" restriction may escape the prohibition if it has an insignificant effect on the market, taking into account the weak position of the parties'. John Bruce claimed it was in a very weak position as against Haldex (a Swedish company) which virtually monopolised the relevant market, driving out potential competitors, and believed that its conduct could not be in breach of any competition law since it was developing competition where next to none had previously existed. The defendant was of the opinion that exemption under section 9 of CA 98 or Article 81(3) TFEU (now Article 101(3)), was warranted if there was an infringement, and the case should have been dealt with by the European Commission as a competition matter between Sweden and the UK, namely imports into the UK of Haldex products.

³⁶³ OFT Decision No. CA98/12/2002, *Price Fixing Agreements involving John Bruce (UK) Limited, Fleet Parts Limited and Truck and Trailer Components*, (Case CP/0717/01), 13 May 2002.

³⁶⁴ See Case 5/69 *Volk v Vervaecke* [1969] ECR 295.

In the OFT's decision John Bruce's claims were rejected. First, the OFT did not accept the argument based on *Vervaecke* as that decision was based on the fact that the product (washing machines) covered a tiny part (0.6 per cent) of the total sales of the territory concerned, whereas John Bruce had significantly greater market shares. Second, as the agreement between the parties was implemented in the UK, they may affect trade within the UK under section 2 of CA 98. John Bruce's claim that they may affect trade within or between other EU Member States did not affect OFT's jurisdiction under CA 98. The OFT next considered the fact that the agreements consisted of both horizontal and vertical elements, and whether the vertical agreements could benefit from an exclusion under CA 98.³⁶⁵ As the agreements were for price-fixing, no such exclusion was applicable to them.³⁶⁶

With regard to the claim for exemption under section 9, the OFT held that John Bruce did not provide evidence to demonstrate that the product could not have been able to compete with the Haldex brand without the (price-fixing) agreements, and therefore, did not qualify for exemption under section 9 of CA 98, and in any case the OFT was not able to take a decision on whether the agreements satisfy the criteria for individual exemption without formal notification.

Having decided that all three parties had entered into price-fixing agreements which are among the most serious infringements under Chapter I prohibitions, the OFT imposed penalties on all three parties under section 36(1) CA 98, calculated according to the 5 Step guide. However, the amounts of penalties are not included in the case record (redacted) and are not available to the public, as are the respective annual turnovers of the parties involved. In fact, the case record is subject to heavy redaction so that not only parts of the documentary evidence but also all price lists, market shares, and annual turnovers are unavailable to the public (It is assumed here that these are commercially sensitive information).³⁶⁷ None of the parties had applied for leniency, with Fleet Parts' complaint instigating the OFT investigation (complaint appears to be owing to Fleet Parts being replaced by a bigger customer by John Bruce).

The OFT considered the relevant market in the case; the relevant product market being automatic slack adjusters for commercial vehicles, and the relevant geographic market included the whole of the UK.

³⁶⁵ (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/319.

³⁶⁶ Articles 3 and 4 of the (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/319.

³⁶⁷ Paragraph 1(2) (b) of Schedule 4 of EA 2002.

The OFT found that the parties acted intentionally or negligently. As the agreements were for price-fixing, there was no limited immunity available under section 39(1) of CA 98 to any of the parties. The OFT imposed penalties on the parties in accordance with section 38(8) of CA 98, having regard to the Guidance on penalties issued under section 38(1) of CA 98.

At Step 1, the penalty is set at a percentage rate (maximum 10 per cent) of the relevant turnover of the undertaking in the relevant product market, and the relevant geographic market affected by the infringement in the last financial year. In accordance with CA 98 (Determination of Turnover for Penalties) Order 2000, the OFT determined the financial year as the business year preceding the date the infringement ended, based on the date of a letter sent by John Bruce.

The actual rate is set depending on the seriousness of the infringement. A number of other factors such as; the nature of the product, structure of the market, market shares of the parties, entry conditions and the effect on competitors and third parties, and more importantly, damage caused to consumers directly or indirectly, have to be considered.

Step 2 is where adjustment for the duration of the infringement is taken into consideration, in this case 18 months approximately. Step 3 is for adjustment for policy objectives, mainly deterrence, and Step 4 makes adjustments for further aggravating or mitigating factors. The final, Step 5, being for adjustments to prevent maximum penalty being exceeded and to avoid double jeopardy.

Although the OFT rejected all of John Bruce's claims in defence, in setting the penalty rate for the company's turnover, the OFT accepted as special circumstances; **a)** that John Bruce has introduced a new product into a market which was difficult to penetrate and increased competition, **b)** that John Bruce was a small new entrant to a market where one supplier (Haldex) had a large share, and **c)** that purchasers of John Bruce product benefited by about 25 per cent lower price than that of the leading product in the market. These were pro-competitive effects arising from John Bruce's actions which benefited the customers, despite the price-fixing nature of the infringement and therefore the OFT set the penalty at 5 per cent of relevant turnover for John Bruce (amount redacted). The OFT, however, acknowledged that in most other circumstances RPM was a serious breach of Chapter I prohibitions, and the penalty would have been set nearer 10 per cent.

No adjustment for duration was made. CA 98 came into force on 1 March 2000. The price-fixing agreement commenced about March 2000, although evidence showed the agreement commenced in November 1999 between John Bruce and Fleet Parts, (the period prior to the

coming into force of CA 98 cannot be taken in retrospect) and was terminated on 31 August 2001, so the OFT decided not to increase the penalty for duration. Interestingly, OFT also did not make an adjustment at Step 3 for deterrence as it considered the earlier penalty was sufficient in this case. OFT did not consider there were aggravating factors, but decided there were mitigating factors. As John Bruce fully cooperated with the investigation OFT reduced 10 per cent of the penalty imposed, for not disputing the facts OFT reduced another 10 per cent of the penalty, and for immediately terminating the RPM on receipt of the OFT's notice under section 26 CA 98, John Bruce received another 20 per cent reduction in the amount of penalty. Altogether 40 per cent reduction of penalty was therefore awarded to John Bruce making it a penalty of 3 per cent in all, of its relevant turnover. No adjustments were made under Step 5 as the penalty did not exceed the turnover stipulated in s 36(8), CA 98.

Despite being the informant (albeit by way of a complaint) Fleet Parts, on the other hand gets a different treatment. The financial year for Fleet Parts was deemed to be from 1 May 2000 to 30 April 2001, preceding the termination of the RPM. The OFT accepted that Fleet Parts helped introduction of the new product into the market, but as it benefited from the lack of price competition due to the price-fixing agreement, OFT set the starting penalty at 8 per cent for Fleet Parts. As with John Bruce there were no changes at Steps 2 and 3. At Step 4, OFT decided there were no aggravating factors for Fleet Parts. On mitigating factors, OFT reduced 10 per cent of Fleet Parts penalty for fully cooperating with the investigation, and added another 10 per cent reduction for not disputing the facts. Again, as Fleet Parts introduced a competition law audit to ensure compliance and introduced a training programme to make all employees were aware of the CA 98 rules, on receipt of s 26 notice from the OFT, a further reduction of 10 per cent of the penalty was given to Fleet Parts, making it a total of 30 per cent reduction. There were no other adjustments at Step 5. The resulting total penalty for Fleet Parts was 5.6 per cent of its relevant turnover, higher than that of John Bruce.

TTC's financial year was determined as the period from 1 January 2000 to 31 December 2000, and the starting point for relevant turnover was set at 8 per cent. The agreement with John Bruce and TTC lasted at least from September 2000 to 31 August 2001, and as before, no adjustment was made for the duration at Step 2. Under Step 3, the OFT increased the penalty for TTC by a factor of three by way of deterrence. Next at Step 4, as TTC fully cooperated with the investigation, a 10 per cent reduction of the penalty was made. However, as TTC had failed to inform their solicitor under an internal policy document, of the price-fixing agreement and thereby acted in breach of their (internal) compliance programme, OFT increased the penalty by 10 per cent. The total amount of penalty for TTC was set at 24 per cent of the relevant turnover, with no further adjustments at Step 5.

This investigation commenced about a year after the OFT's first Chapter I prohibition case (*Arriva*), and approximately a year and a half into the CA 98 coming into force. Fleet Parts was a small distributor and this was the reason given by John Bruce for replacing Fleet Parts with the much bigger TTC. John Bruce was the key player in putting in place the RPM agreements with all the distributors, hence in effect the instigator of the infringement. Yet, John Bruce received a much better deal from the OFT decision (if the percentage rate represents the actual penalty amount). Moreover, the OFT having condemned John Bruce for the RPM, rewarded them for the same action because the result was considered pro-competitive. Since the OFT acknowledged that Fleet Parts also helped towards introducing the new product into the market, should they not have been rewarded as well?

The managing directors of John Bruce and Fleet Parts were directly involved in the agreements, evidenced by correspondence, emails, and memoranda made available to the OFT investigation.

None of the parties made leniency applications prior to the OFT investigation in the case.

5.4 Hasbro I – Hasbro UK Ltd and Distributors (Price-fixing agreements)

This investigation was started by the OFT on a tip-off from an informant, relating to price fixing agreements by Hasbro UK Ltd (Hasbro), one of the largest toys and games suppliers in the UK, with its distributors.³⁶⁸ The OFT carried out on-site investigations under section 27(3), CA 98 in May 2001. The OFT had received a copy of a circular sent to customers earlier, and the OFT found further documents by way of agreements and letters. The OFT found that senior managers of Hasbro were involved, with one Sales Director also admitting that he was an 'instigator' (paras 89 and 90).

Hasbro was later found guilty of price-fixing agreements along with ten of its distributors, by the OFT, in November 2002.³⁶⁹ The decision was appealed to the CAT on 29 January 2003. On 3 March 2003, the appeal was withdrawn.

Hasbro, one of the largest toys and games suppliers entered into agreements with ten distributors to fix prices which restricted the distributors' ability to sell at prices other than

³⁶⁸ Hasbro Ltd is a subsidiary of Hasbro Inc, a US company.

³⁶⁹ OFT Decision No. CA98/18/2002, *Agreements between Hasbro UK Ltd and distributors fixing the price of Hasbro toys and games*, (Case CP/0239-01), 28 November 2002.

Hasbro's list price. The agreements were entered into at the beginning of 2001 and came to an end in July 2001 (when Hasbro wrote to the distributors ending them). No penalties were imposed on the distributors concerned as Hasbro had taken the initiative, and the distributors were substantially in a weaker position to disagree.

Starting point of penalty for Hasbro was between 5 and 8 per cent of its relevant turnover (actual percentage rate redacted). The OFT rejected Hasbro's assertion that the duration was from February 2001 to 10 July 2001, and noted that it was two months after the OFT's on-site visit under s 27 CA 98 (15 May 2001), that Hasbro took action to write to the distributors to put an end to the agreements, but as the duration was less than a year no adjustment was made at Step 2.³⁷⁰

Although the OFT believed Hasbro gained from the price-fixing agreements, no increase was made for deterrence at Step 3 either.³⁷¹ There was involvement by senior officials despite compliance programmes being in place, and the fine was increased by 10 per cent at the next step. The OFT also considered the method by which Hasbro imposed restrictions on the distributors, who were substantially in a weaker economic position to refuse, and therefore, held it to be a serious aggravating factor and increased the penalty by another 20 per cent at Step 4.

The OFT would consider the existence of a compliance programme to be a mitigating factor, but the OFT decided, the fact that senior officials ignored it, offset any adjustment for reduction of the penalty on that basis.³⁷² However, as Hasbro put in a specific compliance programme for staff since the infringement, OFT awarded a reduction of 10 per cent on the penalty. No further reduction was made for cooperation as leniency has been granted on that basis. However, as Hasbro terminated the agreements after the OFT's visit to their premises (albeit after two months, which should normally have been an aggravating factor) another 10 per cent reduction to the penalty was awarded. Hasbro's actions were intentional and, therefore, there was no mitigating factor, the OFT observed. The total percentage added for aggravating factors was 30 percent and the total percentage deducted for mitigating factors was 20 per cent. The total penalty for Hasbro stood at £9 million. No further adjustments were available at Step 5 as the penalty did not exceed 10 percent of Hasbro's relevant turnover.

³⁷⁰ Ibid, para 94.

³⁷¹ A contrasting view as opposed to that taken against Fleet Parts, in Case CP/0717/01 discussed at 4.3 above.

³⁷² A distinct departure from the *Arriva* decision where the parties ignored the compliance procedures in place, but a reduction was made.

Hasbro's penalty was the largest since CA 98 came into force in March 2000 up until this decision, at £9 million, but was then reduced by 45 per cent due to a leniency application made at an early stage and for cooperating fully with the investigation, the amount coming down to £4.95m. (Hasbro's UK turnover in 2001 was £123.8 million and £197.8 million in 2000).³⁷³

BBC news reported that the Consumer Association's Campaigns and Communications Director Allen Asher declared, "Price fixing is theft" adding that the OFT has teeth to use when consumers and honest competitors are affected. The Association was unhappy that the fine was reduced, given that Hasbro did not show remorse.³⁷⁴ A spokeswoman for the OFT said "This is not a victimless crime" but defended the leniency programme.³⁷⁵

Given that Hasbro was the instigator and in a position to put pressure on the distributors, and also Hasbro gained as a result of the price-fixing agreement, the penalty should have been set closer to the 10 per cent turnover. The reduction of the penalty for full cooperation should have been far less in the circumstances.

Here again, the colluders did not come forward with leniency applications before the investigation was started, hence the conclusion is, there was no rush for Leniency by them.

5.5 Hasbro II - Hasbro (UK) Ltd, Argos Ltd, and Littlewoods ³⁷⁶ – (Price-fixing)

A Decision made by the OFT on 19 February 2003, was appealed to the CAT on 7 April 2003. The CAT remitted the case to the OFT on 30 July 2003 to permit the OFT to put witness evidence to the appellants. On 2 December 2003, the OFT issued its second decision in place of its earlier decision. The CAT upheld the OFT's second decision on 14 December 2004, but reduced the fine for Argos and Littlewoods, to £15.0 million (from £17.28 million), and to £4.5 million (from £5.37 million) respectively.³⁷⁷ Both Argos and Littlewoods went to the appellate Court but the appeals were dismissed.³⁷⁸

³⁷³ See n 369, (*Hasbro I*), paras 1 and 7.

³⁷⁴ BBC News online, 'Hasbro fined for toy price fixing' 29 November 2002 < www.news.bbc.co.uk/2/hi/business/2527267.stm > last accessed 06.05.2016.

³⁷⁵ *Ibid.*

³⁷⁶ OFT Decision No. CA98/8/2003, *Agreements between Hasbro U.K. Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games*, (Case CP/0480-01), 21 November 2003.

³⁷⁷ *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2004] CAT 24 and [2005] CAT 13.

³⁷⁸ *Joined Cases, Argos Ltd and Littlewoods Ltd v Office of Fair Trading, JJB Sports Plc v Office of Fair Trading*, [2006] EWCA Civ 1318.

The case concerned three parties Hasbro, Argos and Littlewoods, Hasbro being one of the largest toys and games suppliers in the UK. The three companies had entered into an overall agreement and/or concerted practice to fix the price of certain toys and games supplied by Hasbro. The OFT held that this agreement included two bilateral agreements, one between Hasbro and Argos, and the other between Hasbro and Littlewoods both being price-fixing or concerted practices which breached Chapter I of CA 98 prohibitions, and may have affected trade within the UK. These agreements had as their object and effect the prevention, restriction and distortion of competition in the UK of the supply of the said toys and games.

This investigation started as part of the process of *Hasbro I*,³⁷⁹ which resulted in a Decision against Hasbro and ten of its distributors (para 11). The OFT sent s 26 Notices under CA 98 to Hasbro and a number of retailers on 10 August 2001 for information. Hasbro applied for leniency on 14 September 2001 seeking full immunity or in the alternative a reduction in the level of penalty, in respect of its dealings with the retailers. Hasbro provided the OFT with evidence of the infringement, before the investigation commenced and cooperated with the investigation. Hasbro was granted full immunity, on the condition it cooperated fully with the investigation. As regards evidence, the OFT found internal e-mails, and other supporting documents relating to the infringements in the case.

The OFT carried out an on-site investigation under s 27(3) CA 98 at the headquarters of Argos and Littlewoods and a large number of emails and other supporting documents were obtained as part of the investigation. Having heard the evidence, both oral and written, the OFT gave its decision on 19 February 2003, that all three parties had infringed a Chapter I prohibition. Penalties imposed for Argos, Littlewoods and Hasbro were £17.28 million, £5.37 million, and £15.59 million respectively. As Hasbro had applied for leniency, and complied with its conditions, it received 100 percent leniency and the penalty was reduced to nil.

Both Argos and Littlewoods appealed the decision to the CAT on 17 April 2003. The CAT remitted the case to the OFT, mainly on the strength of new witness statements by three employees/ex-employees of Hasbro, ordering OFT to admit the new witness statements but subject to the Rule 14 procedure.

Having served rule 14 notices for a proposed amended decision on Argos and Littlewoods, and having considered their written submissions in response, (both declined the offer of giving oral evidence or further representation) OFT made its second decision replacing its previous decision.

³⁷⁹ See sec 5.4, OFT Decision No. CA98/18/2002.

In determining the penalties, Hasbro's product market was taken as 10 types of a selection of toys and games and the geographic market was the UK. The starting point was set between 8 and 10 per cent for the relevant turnover (exact percentage redacted). At Step 2, duration for only 2 categories of the products was taken and the penalty multiplied by 1.2, but not for other categories as duration for them was not clear. At step 3, no adjustment was made. Step 4 aggravating factor was that the senior staff were involved, who had compliance procedures in place, and a 10 per cent increase was therefore made. In addition, the OFT found Hasbro to be the instigator, and a second increase of 10 per cent was made. As for mitigating factors, quick action by the parent company with specific compliance procedures put in place for staff and disciplinary action taken against employees involved, allowed the penalty to be decreased by 10 per cent. No further reduction for full cooperation was made as Hasbro has been granted leniency. The fact that Hasbro's involvement was found to be intentional did not merit further reduction under mitigating factors either. The total penalty for Hasbro amounted to £15.59 million. This penalty did not exceed the maximum penalty rate of 10 per cent at Step 5. However, as Hasbro has been given 100 per cent leniency, the penalty was reduced to nil.

The OFT set the Argos's starting point between 8 and 10 per cent, and at Step 2, duration for 2 categories were multiplied by 1.2 and not for others. At Step 3, again there was no change and at Step 4, for full cooperation a reduction of 10 per cent was given. The total penalty stood at £17.28 million for Argos. For Step 5, no change was made as the amount was far below the maximum 10 per cent of the relevant turnover.

Littlewoods' starting penalty was also set between 8 and 10 per cent. At Step 2, the penalty was multiplied by 1.2 for two items, not for others. At Step 3, no change was made for deterrence. For mitigating factors under Step 4, cooperation with the investigation allowed for a reduction of 10 per cent. The total penalty for Littlewoods was thus £5.37 million. No change was made at Step 5 as the penalty did not exceed 10 per cent of the relevant turnover.

Argos and Littlewoods were unaware of the total leniency awarded to Hasbro until the end, and both appealed to the CAT. They requested the OFT to submit (to CAT) the leniency documents, which request the OFT rejected, only submitting some documents from which sections were redacted. The appeals were dismissed, but the CAT reduced the fines for Argos and Littlewoods. This was despite the CAT finding the appellants fully liable for the breach, and acknowledging that both appellants had annual turnovers of over 2 billion each.

An appeal to the Court of Appeal was similarly dismissed. The Court of Appeal commented on the length of the CAT judgement (and OFT judgement) with a subtle admonition, and hoped that future decisions would be delivered succinctly.³⁸⁰

This was the first appeal from a CAT decision to the Court of Appeal, under Chapter I of the CA 98. The Court of Appeal made the observation that OFT's grant of leniency to Hasbro appeared complicated and unclear, and in its conclusion also stated that in the absence of the favoured party (Hasbro) the CAT could not have arrived at a different conclusion.³⁸¹ Clearly, the lack of transparency in leniency agreements due to confidentiality clauses, means there cannot be a balanced analysis of the evidence among the participant defendants

Although Hasbro was granted full immunity by the OFT, it was only after the OFT sent a Notice under s 26 that Hasbro responded positively. Here again the conclusion is there was no rush for Leniency.

5.6 Aluminium Spacer Bars - (price fixing, non-compete agreement, and market sharing)

The OFT found four suppliers of aluminium double glazing spacer bars had infringed Chapter I prohibition by engaging in price fixing, non-compete agreement, and customer allocation/market sharing.³⁸² One party was granted full immunity while a second party was granted 40 per cent leniency. The OFT held that in respect of three of the parties, EWS, Ulmke and DSQ, that they were liable jointly and severally with their parent companies.

A written complaint from a retail double glazing supplier in March 2002 alleging price fixing by manufacturers and distributors in the 'aluminium spacer bar for double-glazing' market triggered the OFT's investigation. This was a highly concentrated market in the UK, and the market was worth an estimated 268.5 million in 2002.

The OFT carried out unannounced inspections of the premises of four parties in December 2002, and incriminating documents were seized from three of the premises. Another inspection was made in March 2003 in respect of a fifth party and copies of documents were

³⁸⁰ Ibid, para 5.

³⁸¹ Ibid, para 290.

³⁸² OFT Decision CA98/04/2006, Agreement to fix prices and share the market for aluminium double glazing spacer bars, 28 June 2006.

taken from the premises. The documentary evidence constituted emails, letters, internal sales reports, memoranda, diary entries, correspondence, attendee lists of meetings, and other documents showing that senior staff, including the Managing Director of DQS attended meetings to fix prices.

The relevant product market was the supply of aluminium Spacer Bars. The relevant geographic market was the UK. The OFT concluded the duration to be from November 2002 to December 2002 or January 2003.

Total immunity was granted to Ulmke, and 40 per cent leniency was awarded to Thermoseal. The remaining two parties, EWS and DQS also received reductions for co-operation, and for taking compliance measures. Interestingly, starting points and adjustment rates at different Steps have all been redacted from the published case record, with only the final penalty amounts for each party published.

Even with full immunity and full cooperation, it took four years for the OFT to conclude the case. One party, DQS together with its parent company appealed to the CAT on penalty, but the appeal was dismissed.³⁸³

Again, there were no leniency applications prior to the OFT taking action in the case.

5.7 UOP /UKae/Thermoseal Case³⁸⁴ - RPM agreement

This case involved a resale price maintenance cartel between the manufacturer of desiccants (absorbent products termed molecular sieves and aluminas) UOP Limited, with four of its distributors during the period of 1 March 2000 until at least 12 March 2003. The OFT found against all five parties, and penalties were imposed on them.

Three of the parties, UKae, Thermoseal, and UOP were granted leniency under the OFT's leniency policy, UKae with full immunity, Thermoseal 50 per cent and UOP with 20 per cent. A fourth party, DGS, a smaller company whose participation in the breach was rather lacklustre, did not receive leniency but their penalty was considerably lower than the other parties. Confidential information provided by the leniency applicants were redacted from the

³⁸³ *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited v Office of Fair Trading*, [2007] CAT 13.

³⁸⁴ OFT decision No. CA98/08/2004, *Agreement between UOP Limited, UKae Limited, Thermoseal Supplies Ltd, Double Quick Supplyline Ltd and Double Glazing Supplies Ltd to fix and/or maintain prices for dessicant*, (Case CE/2464-03), 8 November 2004.

published version of the OFT's decision as a consequence of the leniency being granted, as is normal under the leniency policy. However, the annual turnovers and the penalty calculations of the other parties have also been redacted.

By visiting the premises of a number of the suspected undertakings in December 2002, the OFT seized documents which indicated the existence of a suspected infringement. Documents including correspondence, agendas, meeting notes, faxes, policy notes, memos and invoices were seized. Consequently, the OFT launched an investigation in February 2003. The OFT considered the relevant product market to be the supply of desiccant for use in IG units, specifically through distributors. The relevant geographic market was the UK. The OFT concluded that the parties were involved in an agreement and/or concerted practice composed of five sub-agreements and/or concerted practices that amounted to a single infringement. The overall agreement was entered into before CA 98 came into force, and continued at least until OFT's intervention on 12 March 2003 or no later than 21 May 2003, except in the case of UKae, where the infringement ended on 12 December 2002. The OFT, however, was of the opinion that it was likely that the infringement continued to affect prices after 12 March 2003. For the purpose of calculating the duration, the infringement was taken as having lasted from 1 March 2000 to 12 March 2003, the duration rounded up to 3.25 years. UKae's duration was rounded up to 3 years (UKae's breach having lasted 2 years and 9 months).

Total immunity was granted to UKae, and a reduction of 50 per cent of the penalty was granted to Thermoseal. A reduction of 20 per cent of the penalty was granted to UOP. The overall infringement consisted of a single agreement comprising five sub-agreements between UOP, and the distributors who were party to the case. UOP, UKae, Thermoseal and DQS discussed the policy at meetings. Apart from UOP, there were senior managers including Managing Directors, and a Chairman (DGS) involved from the other parties. UOP gave financial support to distributors in the form of rebate to defend their existing business or win new business as against their competitors, and also as an incentive to source their desiccant solely from UOP. There were considerable number of incriminating documents relating to the agreements. Penalties were imposed in respect of the main agreement only, and not the separate sub agreements.

UOP (subsidiary of a US firm), is a worldwide manufacturer, and supplier to many different industries and the largest in the UK. The effect of the breach on other manufacturers was significant. It was highly likely that the lack of competition would have fed through to the cost of the unit to the final consumer. Market share of the colluding parties increased slightly during the breach.

UOP submitted that a low penalty would be a sufficient deterrent. They pleaded that: there was no attempt on their part to conceal the agreements, and therefore it was not intentional;³⁸⁵ they had compliance programmes and seminars; the employee who was responsible for the agreement was not a senior manager, and; they have taken note of the deficiencies and steps were taken to improve. Although there were senior managers at the highest level involved from the other parties, UOP pleaded that the manager involved from their firm was not a senior manager, which the OFT accepted but expressed surprise that the senior management was not aware of the infringements (para 337).

One party, DQS appealed to the CAT on the amount of penalty, but the proceedings were brought to an end following the OFT consenting to reduce their fine, which it did (from £109,000 to £73,000).³⁸⁶

The approach taken by the OFT in this case to finding the existence of overall concerted practices was from a pattern of conduct demonstrating the common objective of the parties.

Although the OFT does not mention in this case what led them to suspect the existence of the cartel, it can be assumed that the anonymous written information sent to the OFT with regard to the *Aluminium Spacer Bars* case (see 5.6 above) led to this investigation as some of these parties were engaged in that cartel as well.

No leniency applications were made prior to the OFT investigation in this case, meaning that there was no rush for Leniency by the colluders.

5.8 Lladro Comercial SA and UK Retailers – (price fixing)

On receipt of complaints by three UK based independent retailers, the OFT carried out an investigation into an alleged price fixing infringement which involved Lladró Comercial SA (Lladró), a Spanish company producing luxury porcelain and stoneware figurines, and its UK retailers. OFT found that Lladró had entered into bilateral price fixing agreements with its retailers which breached Chapter I prohibition imposed by s 2, CA 98.³⁸⁷ The majority of these agreements were entered into in 1999, before CA 98 came into force (on 1 March 2000), and Lladró had been cleared by the European Commission with the issue of a Comfort Letter

³⁸⁵ Ibid, para 292.

³⁸⁶ *Double Quick Supply Line v Office of Fair trading* [2005] CAT 10.

³⁸⁷ OFT Decision No. CA98/04/2003, *Agreements between Lladró Comercial SA and UK retailers fixing price of porcelain and stoneware figurines*, (Case CP/0809-01), 31 March 2003.

regarding a selective distribution agreement (SDA), drawn up by Lladró intending to implement it across Europe.³⁸⁸

The SDA contained, *inter alia*, a clause (clause 6.3.2) that required retailers, before offering discounts on Lladró figurines, to inform Lladró and to offer the items back to Lladró for repurchase at wholesale price. The SDA also contained clauses (clauses 10.5 and 9.5) that prevented the advertising of discounts.³⁸⁹ Lladró notified the SDA to the Commission on 23 January 1996 seeking negative clearance under Article 81(1) of the EC Treaty, now Article 101(1) TFEU, or in the alternative, exemption under Article 81(3), now Article 101(3). Lladró wrote to the Commission on 26 November 1999, stating that they intended to remove the offending clause as their German retailers had informed them that the clause would contravene German competition law. In the event, the Commission issued a ‘comfort letter’ but also referred to some other clauses in the agreement.³⁹⁰ However, Lladró never changed the said clause and it continued to remain in force. The comfort letter was issued by the Commission on 30 March 2000.

A comfort letter is a letter stating that the European Commission intends to close its file and take no further action in relation to an agreement which has been notified to it. The OFT received confirmation from the European Commission’s Director-General of Competition (D-G Comp) that a comfort letter was indeed issued to Lladró because it considered the agreement did not substantially affect trade between Member States, and therefore did not fall within the scope of Article 81(1) of the EC Treaty.³⁹¹

Lladró had submitted to the Commission in its notification that their market shares stood well below 10 per cent, about 4 percent, in 1999. That estimation, however, was based on all ornamental ware, including both luxury and non-luxury ornaments in the market. The OFT determined the relevant product market for Lladró to be luxury ornamental ware only and therefore did not accept that estimate. OFT sought to obtain information relevant to the period of all ornamental ware in the UK to arrive at a more up to date estimate.

³⁸⁸ 1997 Notice on agreements of minor importance, OJ C 372, 9.12.1997, (“*de minimis Notice*”). Prior to decentralisation under Regulation 1/2003, companies had to give notice of their intended business agreements to the Commission, who before taking a final decision (due to the large number of such applications), would issue a comfort letter which in effect meant clearance, so that the company could enforce it. A comfort letter is not a legally binding document.

³⁸⁹ In Case 86/82, *Hasselblad v Commission* [1984] ECR 883, the European Court held that restrictions on advertising may amount to an indirect form of resale price maintenance.

³⁹⁰ Specific references were made in respect of clauses in the SDA providing for quantitative selection of distributors and prohibited distributors from selling similar brands.

³⁹¹ See n 387, para 113.

The OFT held that in the case of a resale price fixing agreement, it is capable of having an appreciable effect even where the combined market share falls below the 25 per cent threshold.³⁹² For the same reason the agreements fell outside the scope of the Exclusion Order under CA 98.³⁹³ Moreover, no exemptions applied to price fixing agreements either.

S 41(2) of CA 98 prevents a penalty being imposed in respect of the period between notification of an agreement to the Commission for exemption under Article 81(3) EC Treaty, (now Article 101(3) TFEU), and before “the Commission has determined the matter”. While accepting that a penalty could not be imposed in respect of the SDA in the period before the issue of the comfort letter, the OFT took the view that the comfort letter was a “determination” of the matter, and therefore s 41 did not apply to the period after 30 March 2000. Nevertheless, in view of the existence of the comfort letter, OFT decided not to impose a financial penalty on any of the parties, but made a direction under s 32 CA 98, requiring all parties involved to end the infringement within 20 days of the Decision, and to remove the price-fixing clauses from each agreement as appropriate, within 20 working days from the date of the decision. Lladró as the instigator, was also directed to send the OFT a copy of the letter which it was required to send to its retailers detailing the OFT’s Direction, within 10 days.

The three complainants alleged that Lladro had terminated their supply on learning that they had sold the products below the recommended retail price. One retailer had secretly recorded a conversation between him, and a representative of Lladró discussing the agreement. The OFT decided not to disclose the identity of the complainants, (and of those retailers who responded to the s 26 notices served on them by the OFT), in accordance with s 56(2) of CA 98, on the grounds that to do so would be contrary to public interest, based on the belief that the disclosure would have the likely effect of discouraging future informants in similar circumstances.³⁹⁴

Although there were no leniency applications in the case, Lladró escaped without any financial penalty. The OFT stated in its decision that it took the view that the comfort letter could have led Lladró to conclude that the Commission’s decision to issue the letter was based, at least in part, on a substantive competition assessment of the agreement. Therefore, it would not have been unreasonable for Lladró to have concluded that the agreement was not a type to give rise to an infringement on that basis. Indeed, it appears this was the stance taken by Lladró in its defence.³⁹⁵

³⁹² OFT Guideline 401 ‘The Chapter I prohibition’ (March 1999), sec 2.18- 2.20.

³⁹³ CA 98 (Land and vertical Agreements Exclusion) Order 2000, SI 2000/310.

³⁹⁴ See n 387, paras 97- 99.

³⁹⁵ Ibid, para 124.

Understandably, the comfort letter appears to have vexed the OFT somewhat in this investigation, as the Commission appears to have overlooked the price-fixing nature of the agreement. It brings to question how many similar agreements may have been approved by the Commission despite legislation that precludes price fixing agreements benefiting from exclusions and exemptions. It is possible the Commission may have been misled by the low market share presented in the notification, and the fact that Lladró stated in the notification that the particular clause in question would be removed from the agreement. Whatever the reason, it shows the relaxed way in which authorities are willing to accept a businessman's version without further examination or analysis of the market involved.

It is important to note that out of the many retailers only three complained, and the three complainant retailers only came forward after their supply was stopped by Lladro. The OFT determined Lladró to be the instigator, and the agreements being of a vertical nature no penalty was intended upon the retailers.

Documentary evidence in the case consisted of the bilateral agreements with incriminating clauses together with the secretly recorded conversation. There were neither leniency applications nor any penalties imposed on the parties.

5.9 Stock Check Pads Case – (price fixing and market sharing)

The OFT fined three suppliers of stock check pads, for fixing prices and market sharing in the supply of stock check pads in the UK, in breach of Chapter I of CA 98.³⁹⁶ (Stock check pads are generic paper note pads with tear-off sheets used by staff in restaurants, cafés and similar establishments to record customers' orders).

The parties were involved in a single overall agreement and /or concerted practice which had the object of fixing the prices of and sharing the market for stock check pads. The parties' agreement involved fixing the prices at which they would sell check pads to customers, and also not to try and win business from each other. Senior managers and a Managing Director were responsible for the infringement.

Bemrose Group Limited (BGL) and its wholly owned subsidiary BemroseBooth were granted full immunity in recognition of providing evidence before the commencement of the

³⁹⁶ OFT Decision CA98/03/2006, Price fixing and market sharing in stock check pads, (Case CE/3861-04) 31 March 2006.

investigation, thereby reducing their near two million fine to nil. Their leniency application was received by the OFT in December 2003. In February 2004, OFT decided there were reasonable grounds to suspect one or more infringements were engaged in by the parties and, in April 2004, premises of two other companies were searched. Later, one of the other companies, Achilles Paper Group Limited applied for and was granted 50 per cent leniency. Bemrose and Achilles were active in the manufacture of stock check pads, and the subsequent supply to wholesalers who in turn sold them to other wholesalers or direct to end users. The third party involved was 4imprint Group PLC, which exited the market in June 2000. Senior managers were involved in the infringement.

On 23 December 2003 (after the infringement had come to an end), an American company named Appleton Paper Inc acquired the entire share capital of BGL through its UK holding company (Rose Holding Limited), and it was following the buyer's due diligence process for that acquisition that BGL and Bemrose approached the OFT for leniency. The infringement had occurred during the period from May 2000 until December 2003. There were entries in the day book, fax message and letter as evidence of the infringement that had taken place.

The relevant product market was deemed to be the supply of stock check pads. The relevant geographic market was the UK. The OFT noted that the infringement led directly to higher prices in respect of a significant proportion of the relevant market.

The penalty calculation rates are redacted from the records showing only the final penalties imposed on the parties.

Again, this case shows a leniency application was only tendered when a buyer found out about the infringement which was then uncovered by the buyer's lawyers. It is also important to note that the infringement had already ended by that time.

However, the defendant approached the OFT prior to any investigation was begun by the OFT, in this case.

5.10 Northern Ireland Livestock and Auctioneers' case³⁹⁷ - (price fixing)

In February 2001, the OFT began an investigation after receiving a complaint by the Ulster Farmers Union (UFU), that the Northern Ireland Livestock and Auctioneers' Association (NILAA) has infringed CA 98 by recommending the introduction of a standard (or uniform)

³⁹⁷ OFT Decision CA98/1/2003, *Decision of the Northern Ireland Livestock and Auctioneers' Association of undertakings to recommend that its members introduce a buyer's commission in Northern Ireland cattle marts*, (Case CP/0504-01), 3 February 2003.

commission for purchasers of livestock in Northern Ireland cattle marts. The NILAA did not apply to the OFT for an exemption of this decision to fix a £2.00 commission plus VAT on each animal purchased. At the time NILAA represented about 63 per cent of the marts in Northern Ireland.

However, the recommendation by the NILAA was well publicised with a Press Release, issued by the Chairman of the NILAA, copies of which were sent to its members. The OFT also took into consideration the exceptional circumstances that had affected the cattle market, due to BSE (Bovine Spongiform Encephalopathy), and Foot and Mouth disease (FMD). The OFT, therefore, took the decision of not imposing a fine on NILAA, while finding that NILAA had indeed breached s 2(1) of Chapter I, CA 98.

The OFT quoted a number of CJEU cases in support of the fact that a recommendation made by an association of undertakings can amount to a decision, and may amount to an infringement of the Chapter I prohibition of CA 98, where it affects the competitive conduct of its members in the market. The Commission set out the position in *Fenex*, 'While it is normal practice for a trade organisation to provide management assistance to its members, it must not exercise any direct or indirect influence on competition, notably in the form of tariffs applicable to all undertakings regardless of their own cost price structure.'³⁹⁸

The fact that the recommendation was not binding, nor has been fully complied with by its members did not exclude it from the application of Chapter I, CA 98.

In considering the duration, OFT took the start date as the date of the meeting by the NILAA on 19 December 2000 at which the decision was taken. The NILAA was put on s 27 notice of a possible infringement, by the OFT on 9 February 2001.³⁹⁹ In the absence of any representation by the NILAA, the OFT reviewed the evidence as set out in Rule 14 Notice and arrived at its finding, that the NILAA's recommendation that its members introduce a commission on buyers for the purchase of livestock in Northern Ireland cattle marts infringed the Chapter I prohibition.

The duration of the infringement was from 19 December to 1 March 2001, and there was total closure of the cattle marts from the end of February 2001 until August 2001 in Northern Ireland due to BSE and FMD diseases. The OFT took into consideration the overt nature of the

³⁹⁸ *Fenex*, OJ L 181 - 20/07/1996 P, 26-36, para 60.

³⁹⁹ S 27 of the Act provides that the Director may enter premises in connection with an investigation under s 25 of the Act. The Director must, so far as is reasonably practicable give two days' notice of the intention to exercise this power unless he has a reasonable suspicion that the premises are or have been occupied by a party of the agreement that he is investigating under s 25 of the Act.

NILAA's recommendation combined with the exceptional burdens on the NILAA and its members at the time, and decided to exercise its discretion under s 36(1) CA 98 not to impose a financial penalty on the NILAA.

When the marts reopened in August, some of the marts charged a buyer's commission, but there was no evidence to show that the NILAA's recommendation was later revived or renewed. The OFT was of the view that the undertakings were then all acting independently in the market.

At Paragraph 56 of its decision, OFT quoted from the Court of First Instance decision in *Cementhandelaren*,⁴⁰⁰ 'In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be'.

While it could be deemed reasonable that NILLA was let off without a financial penalty due to the harsh conditions prevalent in the cattle market at the time, was there not a connection in the subsequent action taken by some auctioneers to charge the fee recommended by the NILLA in the infringement? Was the OFT's take on the fact that some marts charged the recommended fee later, 'was carried out independently' correct? In *Aalborg*⁴⁰¹ the CJEU has held that an undertaking would be presumed to have participated in an anticompetitive agreement unless that undertaking informs the other parties that it withdraws from the communication immediately. The party not intending to take part should protect itself by recording evidence in writing to the other parties, by giving full account of the meeting to its Board who must keep a full record of minutes, and where necessary by reporting the matter to the Regulator (the OFT in this case). No such disclaimer was made by any of the participant auctioneers, while in effect the NILLA recommendation was clearly intended to replace the risks of competition, with co-operation in the market, the object of which would be restricting competition in the market.

There were ample documents in this case, beginning with the press release, and minutes of meetings, agendas, lists of attendees, and other connected documents connected with this case. There were no penalties imposed by the OFT decision, and there were no leniency applications either.

⁴⁰⁰ Case 8/72, *Vereeniging Van Cementhandelaren v Commission* [1972] ECR 977, [21].

⁴⁰¹ Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, [81]-[84].

5.11 Airline Passenger Fuel Charges case - (price fixing)

By the OFT's decision of 19 April 2012, two airlines, British Airways (BA) and Virgin Atlantic Airways (VAA) were found to have breached the Chapter I prohibition of CA 98 and/or Article 101 of the TFEU between August 2004 and January 2006.⁴⁰² The two airlines had coordinated their pricing by an agreement to their respective passenger fuel surcharges (PFS) for long-haul flights to and from the UK, through the exchange of pricing and other commercially sensitive information. BA was fined £58.5 million while VAA was granted full immunity for having brought the matter to the attention of the OFT. BA also applied for leniency and was granted a reduction of 25 per cent. BA received a further reduction of 20 per cent on account of entering into an early resolution, resulting in the initial penalty imposed which was £121.5 million, being reduced to £58.5 million.

The parties had engaged in applying PFS to the sale of commercial tickets. The surcharges which rose from £5 to £60, were added to ticket prices in response to rising oil prices. Criminal charges against four BA executives under s188 of EA 02 were later dropped, resulting in the acquittal of the defendants.⁴⁰³

OFT conducted an unannounced inspection of BA's premises, and some documents were seized on the day and some others were made available to the OFT at a later date. Informal, voluntary interviews were carried out with VAA staff (by the OFT's criminal investigation team), transcripts of which were transferred to the administrative investigation. Other documents were also submitted to the OFT by VAA, which included telephone records, results of computers, servers, mobile phones and PDAs. Senior managers from both parties were involved in the breach.

The product market was the sale of commercial tickets, and the relevant geographic market was determined on the basis of the point of origin and the point of destination of the flights (O&D), as is normal in airline cases. For the purpose of the OFT's decision the market definition was the O&D airport pairs on which both parties offered long-haul flights and in relation to which both parties charged the PFS. Only those relevant markets where the parties

⁴⁰² OFT Decision No. CA98/01/2012, *Airline passenger fuel surcharges for long-haul flights*, (Case CE/7691-06), 19 April 2012.

⁴⁰³ *R v George, Crawley, Burns and Burnett* [2010] EWCA Crim 1148; See Alice Englehart, 'Collapse of OFT trial against BA' *Allen & Overy*, 8 July 2010.

overlap ('Affected Markets') were deemed to be sufficient in the case to meet the OFT's twin objectives of policy on financial penalties.

The effect on trade between Member States would have potentially deflected demand between the parties and their competitors in other Member States, and their conduct by its nature at least had the potential to affect the pattern of trade between Member States. Hence the conduct of the parties by its nature was capable of coming within the meaning of Article 101, and in accordance with the Commission's Effect on Trade Notice.⁴⁰⁴ Given BA's and VAA's respective market shares in the affected markets, the OFT considered that the effect on trade between Member States satisfied the requirement of appreciability.

Following the entry into force of the Modernisation Regulation on 1 May 2004, the OFT is required to apply Art 101, to practices that may affect trade between Member States to an appreciable extent.

The OFT case was conducted in parallel with a similar case brought by the US Department of Justice (DoJ). The two investigations were carried out separately but the two agencies have consulted each other closely throughout their investigations. BA (who was fined by the US Antitrust Division in a criminal investigation to the tune of \$300 million) had a third of its penalty reduced at Step 3 of OFT's penalty calculations, on account of it being already fined by the US authorities. Account was also taken of the fact that BA suffered losses in the two previous years, and that part of the infringement occurred outside the UK.

The criminal case against the BA executives collapsed due to a number of errors by the OFT, one of which involved not taking possession of the electronic documents of VAA which were submitted during leniency cooperation. At the criminal trial however, it transpired that VAA had not disclosed all relevant e-mails to the OFT at OFT's administrative investigation, expected of a full immunity applicant.

The OFT subsequently had a self-investigatory assessment of what went wrong. In its Virgin Atlantic Airways immunity review - OFT 1398 (December 2011), paragraph 3.14 states:

'In this case, as noted above, VAA might reasonably have been expected to have done more to assist the OFT, pursuant to VAA's duty to maintain continuous and complete co-operation. In the specific circumstances, it is 'genuinely a close call' as to whether the conduct in question amounted to non co-operation such as to warrant the

⁴⁰⁴ Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101 04/81.

revocation of VAA's immunity. Accordingly, the OFT has applied its policy of erring in favour of the immunity applicant.'

OFT also erred in its uncertainty (to assuage VAA) as to the scope of the OFT's obligations to obtain, and its powers to require the disclosure of documents which might be legally privileged. It was the OFT's first contested criminal prosecution, where the particular question arose, and in its internal review in which four issues were raised, decided to take measures to rectify them. Following the collapse of the criminal case, BA threatened to appeal the OFT decision in order to recoup the fine, and costs imposed on BA in the administrative investigation.

This case raises again the reliability of leniency applicants. The immunity applicant was already aware of the US investigation, and the media was showing a great interest in the fuel surcharges, which probably led to the leniency application in the first place. Having applied for and obtaining a marker from the OFT in March 2006, VAA signed the immunity agreement only in December 2008. In the meantime, BA applied for leniency in July 2006, and entered into the leniency agreement in July 2007.⁴⁰⁵

In August 2010, VAA notified OFT that it was in the process of complying with a subpoena for evidence issued by the US DoJ in the criminal investigation into PFS.⁴⁰⁶ OFT requested VAA for a detailed search to be carried out of that evidence, relevant to the OFT case, and provide the results of the search to the OFT. Statement of Objections was sent to the parties in November 2011. Neither party gave oral evidence.

This case, more than any other (of the OFT cases) illustrates the perils of depending purely on leniency applicants' evidence.

In this case, however, VAA applied for leniency prior to the OFT starting an investigation in the UK, probably as it was involved in the parallel investigation in the US, and suspected UK authorities would get involved in a similar investigation.

⁴⁰⁵ See n 402, paras 22 and 23.

⁴⁰⁶ Ibid. para 35.

5.12 Attheraces case⁴⁰⁷ - application for exemption (non-leniency case)

This case arose out of the proposed joint sale of new interactive betting rights to horse racing by 49 of the 59 UK race courses to a consortium, Attheraces (ATR), for the purpose of launching a new TV channel devoted to horse racing, to be financed by betting income generated by the viewers. ATR was made up of Channel 4, BskyB, and Arena Leisure. The parties jointly notified the OFT with a view to obtaining clearance for the agreement.

An application under s 14 of CA 98, on Form N was submitted to the OFT on 15 November 2001, by the parties for a decision as to whether the 'notified arrangement' infringed the Chapter I prohibition, and if it did, for an individual exemption. The notification was placed on the OFT Public Register and informal consultations with third parties were undertaken by the OFT until April 2002. On 8 April 2003, a Rule 14 Notice under Rule 14 of the OFT's procedural rules⁴⁰⁸ was issued to the five applicants and to the race courses involved, stating that the OFT proposed to issue a decision, that one aspect of the notified arrangement infringed the Chapter I prohibition. Following judicial review proceedings, and admitting the British Horseracing Board (BHB) in June 2003 as an intervener on 29 January 2004, ATR gave notice that it would terminate the agreement with effect from 29 March 2004.

During the OFT's investigation two of the parties, ATR and Arena Leisure, agreed with the OFT's view that the agreement was anticompetitive. OFT rejected the application on the ground that it was anticompetitive and in breach of Chapter I prohibition. The OFT held that the agreement had the effect of preventing, restricting or distorting competition in the supply of those rights by increasing the price to ATR, and restricting the incentives for increasing course 'output', (arrangements for the sharing of returns between courses), and that ATR could have instead collected a portfolio of licences with individual courses or small groups of courses.

The relevant product in the decision were five rights affected by the 'notified arrangement'. The OFT devoted some 29 pages of the decision in analysing and arriving at the relevant

⁴⁰⁷ OFT decision No. CA98/2/2004, *Notification by Arena Leisure plc/Attheraces Holdings Limited/British Sky Broadcasting Group plc/Channel Four Television Corporation/The Racecourse Association Limited*, (Case CP/1442-01) 5 April 2004.

⁴⁰⁸ CA 98 (Office of Fair Trading's rules) Order 2000 (SI 2000/293).

product markets,⁴⁰⁹ using the ‘hypothetical monopolist test’. Only one of the rights was a relevant product market in which the notified arrangement could have had an appreciable effect on competition. The relevant geographic market was the UK. No penalties were imposed, as under s 14(4) of CA 98, no penalty is warranted in respect of any infringement of the Chapter I prohibition by an agreement which has been notified to the OFT.

The 49 race courses, the Racecourse Association (RCA), and BHB appealed the decision to the CAT. The CAT held that there is no presumption that an agreement has an anticompetitive effect and, therefore, the burden was on the OFT to show with a reasonable degree of probability that this agreement had an *effect* on competition.⁴¹⁰ The CAT quoted from *Société Technique Minière*⁴¹¹ to illustrate the point.

In order to prove the likely *effect*, the enforcement authority has to create an imaginary scenario, the ‘counterfactual’ as to what the effect would be, in the absence of the intended agreement. The principle in assessing the ‘effect’ is to ‘take as a reference the competition that would normally exist if there was no infringement’.⁴¹² It applies the ‘but for’ test and is applicable only where all objective conditions on the relevant market are taken into account, including the economic context and legislative background.⁴¹³ The assessment need not be precise⁴¹⁴

The CAT accepted the appellants factual background that there was an urgent need for funding, with government support, to finding further finance through the selling of media rights. The CAT criticised the OFT for not taking these into account, and overturned the decision.⁴¹⁵ Both UK and EU competition authorities have generally taken the view that collective selling of sports rights as anticompetitive, and require justification for it to be permitted.⁴¹⁶ The CAT

⁴⁰⁹ See n 407, paras 73-172.

⁴¹⁰ Richard Whish and David Bailey, *Competition Law* (7th edn, OUP 2012), p. 118; Damien Geradin and Ianis Girgenson, ‘The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach’ (2011) TILEC Working Paper series < <http://ssrn.com/abstract=1970917> > accessed 12.03.2014.

⁴¹¹ Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH*, [1996] ECR 235. (The party alleging the restrictive effect bears the burden of proof); See Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty, June 2011. < <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> > last accessed 12.03.2014; Commission Communication – Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, (2009/C 45/02) OJ C 45/7; Antitrust and Monopolies, eBook Collection, EBSCO Publishing.

⁴¹² Case C-76/06 *P Britannia Alloys v Commission (Zinc Phosphate)* [2007] ECR I-4405, [22].

⁴¹³ See *Methionine* case, Commission decision of 2 July 2002, 2003/674/EC, OJ L255, 8/10/2003 1-32.

⁴¹⁴ Case T-213/00 *CMA CGM and others v Commission* [2003] ECR II-913, [342].

⁴¹⁵ See Joined cases, *The Racecourse Association and others and The British Horseracing Board v Office Of Fair Trading*, [2005] CAT 29.

⁴¹⁶ *Joint selling of the commercial rights of the UEFA Champions League*, [2003] OJ L291/25.

did not find it necessary to decide on whether a sporting agreement would affect competition in the context of consumer interest in its search for funding. In effect, the CAT acknowledged a higher price for the rights would not pass onto consumers as a result of the competitiveness of the betting market, which was the appellants' argument.

In this decision by the OFT, there were no leniency applications warranted as the case arose out of an application for exemption.

5.13 Schools Sector - Private School Tuition Fees case

Fifty fee paying independent schools were found by the OFT to have infringed the Chapter I prohibition by engaging in the exchange of specific information relating to annual pricing of future school fees, on a regular and systematic basis.⁴¹⁷ The information exchange was organised by the bursar of Sevenoaks School (referred to as the 'Sevenoaks Survey'), to whom the participant schools submitted details of their current fee levels, proposed fee increases, and the resulting intended fee levels. Through the Sevenoaks Survey, the participants exchanged on a regular and systematic basis highly confidential information regarding one another's pricing intentions for the coming academic year that was not made available to parents of pupils of the participant schools or published otherwise. As evidence, the OFT found information circulated among participants in tabular form, the 'Sevenoaks Survey', details submitted by participants to the bursar, and regular exchanges of highly confidential information not available to parents or available generally. The practice continued from 1 March 2001 and terminated in June 2003, for the purposes of this investigation. Although the practice had been or may have been in existence over a long period of time, the period before the CA 98 came into force cannot be taken into account, and from that date a transitional period of 1 year is given under Schedule 13 of CA 98).

The OFT was informed of the infringement by a journalist who was preparing a report relating to fees charged by independent schools, for the Sunday Times, in April 2003. The OFT began a formal investigation and in June 2003, visited three of the schools having prior notice given to them under s 27(2) of CA 98. On receiving the notices two of the schools, Eton College and Winchester College applied for leniency. Four other schools including Beneden School, and Sevenoaks School also applied for leniency. Two other schools who were not party to the Sevenoaks survey were also granted leniency. A number of other schools who were parties

⁴¹⁷ OFT Decision No. CA98/05/2006, Exchange of information on future fees by certain independent fee-paying schools, (Case CE/2890-03) 20 November 2006.

also applied for leniency at a later stage of the investigation, but were refused as the investigation was at an advanced stage by then.

A number of the participants approached the OFT to offer a binding commitment under s 31 A of CA 98 as an alternative to the OFT proceeding with the case, and arriving at an infringement decision, but due to the seriousness of the case this request was declined. After the Statement of Objections was sent, the OFT was approached by the Independent Schools Council (ISC) seeking to negotiate a resolution to the case.⁴¹⁸ The ISC argued, in particular with a view to reducing the legal and other costs, that the participants were charitable not-for-profit organisations, but the OFT maintained that charitable organisations also come under CA 98. The OFT entered into discussions with an ISC steering group which included senior governors of the participant schools, and chaired by the General Secretary of the ISC and a proposed resolution was reached.

In view of a number of exceptional features of the case, the OFT decided to deviate from the penalty Guidance and limit the penalties imposed on each of the participants. Each participant was ordered a fixed amount of £10,000, subject to leniency granted to some of the participants.⁴¹⁹ No penalty was imposed in respect of the Royal Hospital School, which is part of a trust whose sole trustee is the Secretary of State for Defence, and therefore having Crown immunity, the OFT cannot require it to pay a penalty under CA 98.

The penalties were thus limited to a nominal amount of £10,000 per participant school, subject to the reductions agreed with the leniency applicants, in view of the following exceptional features:

- The voluntary admission by the participants,
- The participants agreed to make an *ex gratia* payment to fund a £3 million educational trust fund for the benefit of pupils who attended their schools during the said breach, and
- Participant schools were all non-profit making charitable bodies.

⁴¹⁸ See John Clare, '50 public schools fined for fixing their fees' *The Telegraph*, 25 February 2006. The report added, "The deal was thrashed out in a series of meetings between the OFT and a high-powered group of independent school governors. The group included Lord Lyell, a former Attorney General and a governor of Stowe, and Sir Bob Reid, a former chairman of British Rail and a governor of St Edward's, Oxford". < <http://www.telegraph.co.uk/news/uknews/1511429/50-public-schools-fined-for-fixing-their-fees.html> > last accessed 12.05.2016.

⁴¹⁹ See n 417, para1430; See Rebecca Smithers, 'Slap on the wrist for private schools in fees cartel' *The Guardian*, 27 February 2006. < www.theguardian.com > last accessed 04 June 2015.

Included among the 50 participants were Eton College, Harrow School, Malvern College, Marlborough College and Westminster School. On becoming aware that the Sevenoaks Survey was unlawful, the parties ended the infringement. This was in June 2003, when the OFT began its investigation.

The OFT used a market definition to establish the closest substitute to the product that was the focus of the investigation, which would usually be the immediate competitive constraints on the behaviour of the undertaking controlling that product. Referred to as 'the focal product' the OFT considered two focal products provided by the participant schools, namely; the provision of educational services to boarding pupils and, the provision of educational services to day pupils. The geographic market for the former was the UK, but the OFT could not reach a definitive conclusion as to the relevant geographic market for the latter, owing to the fact that there were pupils from various countries other than the UK, in these schools.

The OFT concluded that the infringement artificially facilitated the horizontal coordination of price increases capable of altering the pattern of trade within the UK. Effect on trade within the UK is purely a jurisdictional test, not read as importing a requirement that the effect on trade should be appreciable.

The OFT reduced the penalty imposed in respect of the following participants; Eton College 50 per cent, Winchester College 50 per cent, Sevenoaks School 45 per cent, Benenden School 30 per cent, Cheltenham Ladies' College 30 per cent and Malvern College 20 per cent.

The Telegraph reported, 'Even a fine of five per cent of turnover, half the maximum available to the OFT, would leave them facing a penalty of £33 million between them'⁴²⁰

The OFT included a caveat in the decision that, should the parties wished to appeal, OFT reserved the right to vary the penalties, and that the parties should pay costs to the OFT.

Interestingly, the OFT also agreed to incorporate a clause in the terms of the resolution, expressly stating that no finding has been made as to whether the infringement had any effect on fee levels at each of the participating schools. While admitting the Chapter I infringement, no admission was made by any of the participants that the exchange of information by way of Sevenoaks survey had any effect on fee levels. The resolution also stated that the payments by the participants to the trust set up may be expressed as being paid without any admission as to liability, and need not be expressed as representing "compensation" for any loss⁴²¹.

⁴²⁰ See Peter Allen and Julie Henry, 'Revealed: how two boys blew whistle on the public school fees 'cartel' *The Telegraph*, 13 November 2005 < www.telegraph.co.uk > last accessed 10.05.2016.

⁴²¹ See n 417, Annex 1, para 4c at 452.

The parties claimed they were unaware that the exchange of fee levels by the Sevenoaks Survey infringed the Chapter I prohibition, which was irrelevant in establishing that the infringement was committed intentionally or negligently. Nevertheless, the OFT noted that the entry into force of CA 98 in March 2000 was preceded by a considerable amount of publicity, including OFT's publication of detailed guidelines on the major provisions of the CA 98, and the undertakings that it would be applicable to, including those that had previously been exempt from the provisions of the Restrictive Trade Practices Act. There were prior consultations, draft bills (by different governments) before CA 98 was finally enacted.

It seems incomprehensible that senior officials running such prestigious schools were unaware of the much publicised legislation, considering they were in effect running commercial projects, albeit under the label of charitable organisations. The General Secretary of the ISC declared, 'The law seems to have changed without Parliament realising – and without the independent sector being consulted ...'⁴²²

There were no leniency applications made in this case, although leniency was granted to some of the participants.

5.14 Banking Sector - MasterCard UK Members Forum Limited

In September 2005, the OFT made a Decision that MasterCard UK Members Forum Limited (MMF) consisting of 17 major banks, acted in breach of a Chapter I prohibition by a collective price agreement between the members of MMF in setting the fall-back multilateral interchange fee (MMF MIF).⁴²³ The agreement applied in respect of all transactions made in the UK using MasterCard branded consumer credit and charge cards between 1 March 2000 and 18 November 2004. The agreement resulted in unjustified recovery of certain costs ('extraneous costs') due to the MMF MIF interchange fee. The OFT decided that because the agreement had ended prior to the Decision, no directions were needed to be given, and having regard to all the circumstances of the case it was not appropriate to impose a financial penalty on the parties. The Decision came after some five and a half years of investigation. Notwithstanding

⁴²² BBC News, 'Private schools fee-fixing ruling' 9 November 2005. < www.news.bbc.co.uk/2/hi/uk_news/education/4420822.stm > last accessed 18.11.2017.

⁴²³ OFT Decision No. CA98/05/05, *Investigation of the multilateral interchange fees provided for in the UK domestic rules of Mastercard UK Members Forum Ltd (formerly known as Mastercard/Europay UK Limited)*, (Case CP/0090/00/S), 6 September 2005.

that there was no financial penalty, the MMF appealed to the CAT. The CAT quashed the OFT's Decision and ordered OFT to pay damages to the appellants, and also to the intervener.

On the date of entry into force of CA 98 (1 March 2000), MasterCard notified to the OFT a set of agreements including the MMF MIF agreement. On 1 September 2000, the British Rail Consortium (BRC) made a complaint to the OFT against the MasterCard scheme, and other UK payment card schemes focusing on the setting of multilateral interchange fees, including MMF MIF in particular.⁴²⁴

The OFT found that the MMF MIF led to an unduly high interchange fee being paid to card issuing banks on every transaction made using a MasterCard credit or charge card in the UK. The cost of this fee was ultimately passed onto all consumers, by causing merchants to charge higher retail prices. In effect, the fee acted as a tax on retail transactions paid by all consumers in outlets that accepted MasterCard cards in the relevant period. The result was higher retail prices for all UK consumers. Interchange fees are among the most frequently paid prices in the UK economy, and in 2004, MasterCard credit and charge card transactions in the UK were worth £42.7 billion.⁴²⁵ Between 1 March 2000 and 18 November 2004, bilateral arrangements on interchange fees were virtually non-existent in the MasterCard scheme, and the interchange fee which applied to MasterCard transactions was, almost without exception, the MMF MIF. The OFT concluded that the MMF MIF agreement created an appreciable restriction of competition in two ways; a) it deterred parties from entering into bilateral agreements i.e. there was little or no competition between them on the level of interchange fees while the MMFMIF agreement was in place and, b) it resulted in parties recovering 'extraneous costs' i.e. cost of services provided which are not integral to the MasterCard scheme, for example, interest free periods. This resulted in paying higher MMF MIF charges which passed along the chain until it was passed on to the consumer by way of increased retail prices. The OFT also found that the agreement distorted competition within the MasterCard scheme in two ways; first, MasterCard issuers having to recover from cardholders the full cost of extending credit to them, rather than recovering some of those costs through MMF MIF, and secondly, the extra revenue from a higher MMF MIF meant that cardholders were spending more on MasterCard cards irrespective of whether they used them for borrowing or not.

⁴²⁴ The BRC is the trade association of the retail industry and represents more than 90 per cent of the total retail trade in the UK, para 57.

⁴²⁵ See n 423, paras 52 and 510.

Nevertheless, the scheme was not all bad, and the OFT found there were a number of benefits⁴²⁶ to the cardholder as it was universally accepted, but it also meant merchants could not select which issuers' card they would accept. Notwithstanding all the resulting contraventions, OFT decided not to impose a financial penalty on the MMF.

The OFT's 5 ½ years of investigation produced a 264-page document, 52 of which bearing Annexes (some of which were redacted) in support of the Decision. The OFT Decision itself consisted of 747 paragraphs. It is possible the fact that powerful banks were the defendants in the investigation (the case was prior to the financial crisis), made it necessary for the OFT to wade through a maze of actions, transactions and complicated schemes before making its pronouncements. But to what purpose? The MMF MIF scheme had lapsed,⁴²⁷ but the OFT was aware a new interchange fallback fee was likely to be instituted by the MMF, and warned that the OFT ruling would apply to any such future scheme.⁴²⁸

The MMF being a collection of some 17 leading banks, appealed to the CAT despite not having to pay any financial penalty. What then transpired was the most unusual of occurrences concerning public regulatory actions. MMF UK were joined by MasterCard International Incorporated (MCI) and MasterCard Europe SPRL (MCE), together with the Royal Bank of Scotland Group (RSBG) as appellants. New contenders, Visa (Europe) Limited and Visa (UK) Limited came in as Interveners in support of the appeal against the OFT Decision. The British Retail Consortium supported the OFT as Intervener.

MCI is a Delaware corporation which owns the MasterCard trademarks, and licences them to financial institutions worldwide having the responsibility for rules, standards and procedures of administration, MCI being the main operating subsidiary of the MasterCard group of companies. MCE is a subsidiary of MCI processing UK transactions. RSBG is a member of the MMF and one of the principal issuers of MasterCard credit cards in the UK.

Intervention by Visa (Europe) Ltd and Visa (UK) Ltd was pursuant to an Order by the CAT dated 9 December 2005. The Commission had previously taken a decision granting exemption under Article 81(3), as it then was (now Art 101(3)), for the multilateral interchange fee in respect of international (as opposed to domestic) transactions under the Visa system.⁴²⁹ The

⁴²⁶ Ibid, paras, 524 and 528-531.

⁴²⁷ Ibid, para 65.

⁴²⁸ OFT press release: 'MasterCard UK Members Forum Limited' **No.** CA98/05/05, 6 September 2005.

⁴²⁹ *Visa International – Multilateral Interchange Fee*, OJ (2002) L318/17.

CAT wrote to the Commission by letter dated 24 January 2006, seeking its observations pursuant to Article 15 of EC Regulation 1/2003 on the matter. However, the Commission in its reply dated 9 February 2006, informed CAT that it did not wish to submit observations at that stage. Subsequently, the CAT invited all parties involved to agree to a list of issues for consideration at a case management conference which proved impossible. The OFT submitted a separate list of issues and, the appellants and Visa provided their separate lists.

At the case management conference, the appellants and Visa submitted (to the CAT) that there were material divergences between OFT's defence, and its Decision. They alleged that the OFT had effectually introduced a new decision abandoning the Decision taken at the conclusion of the investigation. The OFT had taken advice from two experts employed by an international consultancy firm, and offered recommendations from their report to modify the MMF MIF in order for it to be able to operate without infringing the Chapter I prohibition. The OFT accepted that the Defence had been reached by a different route to that taken by the Decision, and that the route taken in the Defence was only a substitution. The OFT's explanatory letters in reply to the appellants' requests were rejected by the appellants. The CAT could either have remitted the matter back to the OFT, as Visa wished, or as MMF and RSBG wished proceeded with the appeal on a 'judicial review' basis,⁴³⁰ but the CAT did neither.

On 31 January 2006, the appellants filed objections to an application by the BRC for the disclosure of some 39 confidential documents belonging to the appellants in order for BRC to prepare its Statement of Intervention. The appellants stated that some of the documents were their 'Crown Jewels' and highly confidential, and also alleged it would be time consuming, extending the proceedings unnecessarily!⁴³¹

After lengthy legal arguments, with the appellants demanding more clarification of every divergent paragraph of the Decision, the CAT ordered the OFT to file within 14 days, a paragraph by paragraph schedule stating in summary form the parts of the Decision that it no longer relied on, withdrawn or no case was made of or were qualified, giving brief particulars and cross-references to the Defence. The CAT made the Order on 9 May 2006, pursuant to Rule 19(1) and Rule (2) (b) of the CAT's Rules (SI 2003/1372).⁴³²

⁴³⁰ Ibid, para 14.

⁴³¹ *MasterCard UK Members Forum Ltd and others v Office of Fair Trading, (Disclosure)*, [2006] CAT 2, paras 4, 5 and 9.

⁴³² See n 423, para 33.

OFT's response was to withdraw the Decision. (Notwithstanding the unprecedented withdrawal of its Decision, the OFT maintained that its original legal and economic reasoning were sound but did not intend to waste time on past infringements. It wanted to focus on investigating the current credit card interchange fees as a whole).⁴³³

On withdrawal of the Decision by the OFT, the CAT quashed the Decision,⁴³⁴ and made its order, of awarding costs not only to the appellants, but to the intervener as well. The total costs claimed by the appellants were reported to be just under £5 million which was more than 40 per cent of the OFT's enforcement budget.⁴³⁵ However, the CAT stipulated the award of costs to be from the date that OFT filed its Defence, i.e. 31 March 2006 rather than the date of the Decision, i.e. 6 September 2005.

Leniency did not apply in this case as it was initially an application to the OFT for exemption.

Since the dismissal of the MasterCard Decision, an interesting development has been the decision by the Commission, prohibiting MasterCard's multilateral interchange fees (MIF) for cross-border payment card transactions with MasterCard.⁴³⁶ It held such transactions in the European Economic Area (EEA) violate the EC Treaty rules on restrictive business practices thereby infringing Article 81. MasterCard was given six months to withdraw the fees in compliance with the Commission's order.

Although MIFs are not illegal in themselves, they are only compatible with EU competition rules if such transactions contribute to technical and economic progress, and are of benefit to the consumers. In the EU, over 23 billion payments exceeding a value of 1,350 billion euros are made every year with payment cards. Commissioner Neelie Kroes has said that the MIF agreements inflate the cost of card acceptance by retailers, and the consumers risk paying twice; once through annual fees to the bank, and again through inflated retail prices which are then paid not only by the card users but by those who pay by cash as well. This sounds very much like the OFT decision.

⁴³³ OFT press release 97/06, 'OFT to refocus credit card interchange fees work' 20 June 2006.

⁴³⁴ *MasterCard UK and others v Office of Fair Trading* [2006] CAT 14.

⁴³⁵ See *The Lawyer*, 7 August 2006 < <http://www.thelawyer.com> > last accessed 20.05.2014.

⁴³⁶ European Commission – IP/07/1959 and 19/12/2007; MEMO/07/590; In May 2012, the General Court rejected MasterCard's appeal against that decision, MEMO/12/377 and Case T-111/08 *MasterCard and others v Commission*; MasterCard has since appealed the decision to the Court of Justice which upheld the decision on 11 September 2014, C- 382/12 P *MasterCard and others v Commission* (Judgement of 11.09.2014).

The CMA has announced that it has decided to close its investigations into MasterCard and Visa multilateral interchange fee infringements after the EU passed an Interchange Fee Regulation (IFR), capping interchange fees.⁴³⁷

The CAT has, in the meantime awarded damages to the tune of £68.6 million to Sainsburys supermarket against MasterCard in respect of the multilateral interchange fees.⁴³⁸ The case was transferred from the High Court to the CAT pursuant to the powers granted to the CAT under CRA 15.

Since then, a collective action over fees charged by MasterCard was filed before the CAT, by former chief Financial Services Ombudsman as the proposed representative of the class of UK consumers that have suffered loss, claiming £14 billion in damages on behalf of all UK consumers.⁴³⁹ The case was dismissed by the CAT.⁴⁴⁰

5.15 Professional Loan Products case

The OFT started an investigation in April 2008, in relation to the pricing of loan products to large professional services firms, by the Royal Bank of Scotland (RBS), and Barclays bank. OFT decision of 20 January 2011 concluded that, the two parties infringed the Chapter I prohibition and/or Article 101 by participating in an agreement to supply loan products to large professional services firms.⁴⁴¹ The decision concluded that the agreement was entered into in October 2007, and was terminated at least in February or March 2008. The infringement was the provision of confidential commercially sensitive pricing information by RBS to Barclays, which comprised of both generic and customer specific information, with the object of facilitating the coordination of the parties' respective pricing on the loans supplied. The OFT found evidence that the information was taken into account by Barclays in determining its own pricing. The focus of the infringement related to Barclays' former Head of Team,⁴⁴² meaning the discovery was made after he left. There were senior officers involved from RBS, and the OFT found that RBS was the instigator.

⁴³⁷ CMA press release, 'CMA closes MasterCard and Visa investigations following EU regulation' CMA, 6 May 2015; Case References: MasterCard: CE/6345/05; Visa: CE/4500/04.

⁴³⁸ *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and others* [2016] All ER (D) 126 (Jul).

⁴³⁹ See Monidipa Fouzder, '£14bn damages claim filed against MasterCard' *Law Society Gazette*, 8 September 2016.

⁴⁴⁰ See *Walter Merricks CBE v Mastercard Inc and Others* [2017] CAT 16.

⁴⁴¹ OFT Decision No. CA98/01/2011, *Infringement of Chapter I of the CA98 and Article 101 of the TFEU by Royal Bank of Scotland Group plc and Barclays Bank plc*, (Case CE/8950/08), 20 January 2011.

⁴⁴² *Ibid*, paras 16 and 17.

Nevertheless, the matter was brought to the OFT's notice by Barclays under the OFT's leniency programme.⁴⁴³ Barclays was granted total immunity, while RBS entered into an early resolution and agreed to pay a total of £28.59 million as penalty to the OFT.

There was an international dimension to the infringement by the parties, in the banking sector. There was evidence in the information submitted by the parties that debt finance had been sought from them by UK-based large professional services firms for use outside the UK. Also several of the parties' customers had international aspects to their businesses.

The investigation started due to Barclays approaching the OFT with a leniency application in March 2008. The OFT made an unannounced visit to the premises of RBS on a warrant obtained under s 27 of the CA 98. The OFT seized telephone records, IT server and took images of hard drives. The OFT visited Barclays premises on notice and took images of laptop documents of key personnel, and telephone records pertaining to the infringement. Barclays' employees relevant to the infringement were also interviewed. In March 2010, RBS agreed an early resolution to the investigation by admitting it had infringed Chapter I prohibition and/or Article 101. In the agreement, RBS offered to pay a penalty of £28.59 million, which included a 15 per cent reduction made by the OFT in recognition of the early resolution.

Following the entry into force of the Modernisation Regulation from 1 May 2004, the OFT is required to apply Article 101, when applying national competition law where the infringement may affect trade between Member States to an appreciable extent. Both parties carried out their businesses at international level, and there was the potential for trade to be affected as opposed to there being an actual effect on trade. In *Raiffeisen Zentralbank*, the General Court held that a banking cartel in Austria had an effect on trade between Member States.⁴⁴⁴ That decision was upheld by the CJEU.⁴⁴⁵ The OFT considered that Barclays/RBS infringement may also have had an effect on trade between Member States.⁴⁴⁶

However, the OFT concluded that in this case, the relevant geographic market was the UK national market.⁴⁴⁷ Barclays disputed the OFT's definition of the product market. Having gone

⁴⁴³ Ibid, para 365.

⁴⁴⁴ See Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and Others v Commission of the European Communities* [2006] ECR II-5169.

⁴⁴⁵ Joined Cases C-125/07 P, etc. *Erste Group Bank AG v Commission* [2009] ECR I-8681, [66] [70].

⁴⁴⁶ See n 441, paras 341-342.

⁴⁴⁷ Ibid, paras 106-108.

through a lengthy assessment,⁴⁴⁸ the OFT concluded the relevant product market to be the provision of core lending and deposit products to Large Professional Services⁴⁴⁹

In calculating the penalty for RBS, starting point was set at 6 per cent in Step 1. No adjustment was made at Step 2 for duration, which lasted five to six months (and only ended after OFT's intervention).⁴⁵⁰ At Step 3, an increase by way of a multiplier of two was made as a deterrent. For being the instigator, an uplift of 10 per cent was added at Step 4 which was balanced out by a 10 per cent reduction for cooperation.

A leniency application in this case was made by Barclays prior to any investigation by the OFT.

5.16 Replica Football Kit case⁴⁵¹ - Price-fixing in the Sports sector

The OFT received a letter of complaint on 3 August 2000 from Sports Soccer Ltd, a retailer, stating that price fixing agreements were rife in the Sports industry despite an investigation carried out by the OFT in the previous year (1999). On that occasion the industry had given assurances to the OFT that they will take measures to prevent infringements in the future. Those assurances were given by, among others, the Football Association Ltd ('the FA') and the FA Premier League ('English PL') clubs. The price fixing agreements were in relation to the sale of replica football kits made by Umbro Holdings Ltd.

Due to the OFT investigation in 1999, the FA and English PL clubs agreed to include a clause in their new licensing agreements not to prevent dealers from offering discounts, and as a result the OFT issued a press release in August 1999, stating that the Football price-fixing has ended.⁴⁵²

After receiving the current complaint of 3 August 2000, OFT interviewed the complainants on 30 March 2001 and began a formal investigation. OFT made unannounced visits to the premises of a number of the participants (on warrants under s 28, CA 98), and seized documents in August and September 2001. Section 26 Notices were sent to various parties involved and in May 2002, a notice under rule 14(1) of the OFT's rules ('Rule 14 Notice') was sent to FA, Umbro, Sport Soccer, and a number of other dealers and retailers numbering

⁴⁴⁸ Ibid, paras 47-92.

⁴⁴⁹ Ibid, para 92.

⁴⁵⁰ Ibid, para 379.

⁴⁵¹ OFT Decision No. CA98/06/2003, *Price-fixing of Replica Football Kit*, (Case CP/087/01) 1 August 2003.

⁴⁵² OFT press release PN 30/90, *Football kit price-fixing ended*, 6 August 1999.

eleven in all. One party, Debenhams, was later dropped after evaluation of its representations. The evidence seized included formal written agreements, monthly reports, file notes, handwritten comments, faxes, diary entries, memos, letters and emails. Management at the highest level were involved in the infringements, including the Chairman of JJB and the Chairman who was also a Director of Allsports. Chief Executives, Directors and Managing Directors of the parties were involved which the OFT considered to be an aggravating factor.

There were four price-fixing agreements involving seven parties including JJB, JD, MU, Sports Soccer, and Umbro. These related to certain Umbro licenced Replica Shirts during key selling periods for home games and international tournaments. Although the OFT regarded the agreements as distinct infringements, there was a good deal of overlap between them and as such, the OFT decided to count them together. When assessing whether any party has engaged in repeated infringements, such action was to be treated as an aggravating factor. The OFT, therefore, decided not to impose separate penalties for each distinct infringement, but to impose a single penalty duly increased to take into account the multiple infringements.

The relevant product market was deemed to be each club's or national team's Replica Kit, and the geographic market was UK wide. The OFT determined there was a second relevant product market, i.e. the granting of club or team trademark Intellectual Property (IP) licences for the manufacture or sale of Replica Kit for each club or team. This second market was defined for the purpose of calculating a financial penalty for Manchester United (MU) and the FA, as their businesses were active in it. The relevant geographic market was also as wide as the UK.

The product market IP is an essential input for the manufacture and supply of Replica Kit. Demand for IP licences is derived from the demand for each Replica Kit. IP licence is not the same as the Kit itself.

The effect of the infringement on third parties was significant, but the OFT concluded that the consumer damage was not measurable or useful. The infringement affected 50 per cent of the total sales. Umbro was found to be an instigator, and they used retaliatory measures against those who deviated from the agreement. Umbro also had its senior managers involved, and were found to have engaged in 3 breaches. Umbro had also previously given assurances to the OFT (in 1999) to stay away from anticompetitive behaviour. However, Umbro's actions were deemed reactive due to pressure from JJB and MU. They were given a reduction on that account as well as for putting in compliance training, and also for cooperation. Their market share was 100 percent for both manufacture and sales. The OFT fined Umbro £6.641 million.

Allsports was nationally a small company but the second largest by the number of stores after JJB. Allsports never accepted involvement but admitted organising a meeting, for which cooperation a reduction in the penalty was given.⁴⁵³ Senior most managers (along with the chairman who was also a director, and the CEO of JJB) were involved in the breach, and the OFT imposed a fine of £1.350 million on Allsports.

Blacks were the third largest retailer, and they attempted to blame their subsidiary and vice versa but the OFT rejected that claim and imposed a fine of £0.197 million on them. Sports Connection was the smallest high street retailer, and they had pressure from Umbro. They had been given immunity in respect of other breaches, and leniency plus for this decision, and as a consequence their fine was £0.020 million. JJB was the biggest sports retailer, and was an instigator, and contributed to the establishment of two of the agreements. JJB pressurised Umbro, and consequently they were fined £8.373 million. JD did not accept liability and were fined £0.073 million. MU was also an instigator, and put pressure on Umbro. MU as licensor had 100 per cent team trademark IP licences. Although they had compliance training in place, acted in breach of compliance. They also had given assurances in 1999, and yet senior managers, were involved in the infringement. MU offered limited admission which was taken as a mitigating factor, and they were given a penalty of £1.652 million.

Sportsetail was a web retailer and a new entrant who was involved at the behest of other parties. Their action was considered of low impact, and the OFT fined them £0.004 million, but they were granted total immunity and their penalty was therefore zero. Sports Soccer was the whistleblower, but continued with the infringement and they also did not disclose an earlier breach. Their cooperation was slow, and they informed others when they were asked not to. Sports Soccer was fined £0.123 million. FA had 100 per cent IP market, and barriers to entry was high. FA was given 20 per cent leniency even though FA did not stop the infringement until nearly 3 months after the investigation began. FA was an essential participant in England Direct Agreements and exercised clear influence over retail prices of Sportsetail. FA still received 20 percent leniency for cooperation, and their fine was reduced to £0.158 million.

FA is the governing body for football in England (founded in 1863) and its rules govern the conduct of football in England, covering not only the playing of football but also the conduct of clubs and their players. The FA has devolved some of its powers to other bodies such as the FA Premier League Ltd. The FA is also affiliated to FIFA (international football association) and UEFA, the European football governing body. The FA also licenses other companies to

⁴⁵³ See n 451, para 617.

manufacture and supply other England team merchandise but not replica football kit.⁴⁵⁴ The FA's activities involve licensing the commercial rights of the England teams, concluding sponsorships and licensing agreements, selling broadcasting rights and selling tickets for games involving England teams. Hence, FA is an undertaking engaged in economic activities.⁴⁵⁵ Under those powers the FA licenses Umbro to manufacture, supply and distribute the England team replica football kit and certain other England merchandise.

JJB and Allsports appealed to the CAT on grounds of both liability and penalty, while Umbro and MU appealed on the amount of penalty only.⁴⁵⁶ The CAT upheld the OFT's decision but reduced the penalties of 3 of the parties, but increased that of Allsports because they were found to have misled OFT on the fact that they were fully cooperating with the investigation, but in fact did not disclose all the evidence that was later made available to the CAT. The increase was the same percentage by which the OFT had given a reduction in Allsports' penalty for cooperation.⁴⁵⁷ The trial took 14 days, with witnesses being cross examined before the CAT. Umbro tried to block confidential information being provided to the other parties, and the CAT took exception to that,⁴⁵⁸ with the request being rejected. The CAT is not bound by the restrictions on the OFT, relating to the rules regarding disclosure nor by the guidance on penalties.

JJB appealed the CAT's decision to the Court of Appeal. The Court of Appeal dismissed JJB Sports' appeal against CAT's judgement on both liability and penalties, and upheld CAT's findings.⁴⁵⁹ Following the Court of Appeal decision, the appellant applied for leave to appeal which was refused by the Court of Appeal. Subsequently, the House of Lords' Appeals Committee refused to grant JJB Sports leave to appeal against the Court of Appeal judgement, in Feb 2007.⁴⁶⁰

In March 2007, the Consumers' Association, brought a claim against JJB, the first and only consumer damages action brought under s 47B.⁴⁶¹ The case was later settled, announced on 9 January 2008 by both parties. The CAT made the order for withdrawal of the action, and for reasonable costs.⁴⁶² The Consumers Association (now known as "Which?"), made it known

⁴⁵⁴ Ibid, para 51.

⁴⁵⁵ Ibid, para 305.

⁴⁵⁶ See *JJB Sports plc and Allsports Limited v Office of Fair Trading*, [2004] CAT 17 (liability); [2004] All ER (D) 23 (Oct), paras 7 and 8 respectively.

⁴⁵⁷ *Umbro Holdings Ltd and others v Office of Fair Trading*, [2005] CAT 22, paras 231, 232 and 234.

⁴⁵⁸ *Umbro Holdings Limited v Office of Fair Trading*, [2003] CAT 26, paras 42 and 43 in particular.

⁴⁵⁹ See Joined Cases *Argos, Littlewoods and JJB Sports plc v Office of Fair Trading*, [2006] EWCA Civ 1318.

⁴⁶⁰ OFT Press release 17/07, House of Lords rejects appeal in price fixing of toys and games and replica football kit cases, February 2007.

⁴⁶¹ S 47B of CA 98.

⁴⁶² *The Consumers' Association v JJB Sports Plc*, Case 1078/7/9/07.

that initially JJB offered a free shirt and a mug to those people who had a relevant replica shirt as compensation! What they got in the end, under the settlement was £20 each for litigants, and £10.00 for anyone with proof of purchase or the shirt with the label intact!

Which? has said that, had the collective redress system been based on 'Opt-out' and 'Cy-près'⁴⁶³ the case would have made a greater financial impact, ensuring that the affected consumers were properly compensated. The 'opt-in' system, the collective action had to operate under, meant the number of consumers opting in were very low, and it was time consuming and expensive considering the amount of resources and external legal costs needed to be spent.⁴⁶⁴ The Government has since introduced a limited Opt-out collective actions regime, and alternative dispute resolution under the Consumer Rights Act 2015, the outcome of which will only be seen in the future.⁴⁶⁵

It was a year after the *Replica Football Kit* case, that s 19 of EA 02 introduced a new clause, 47B into CA 98. This allowed certain 'specific bodies' to bring damages claims before the CAT on behalf of two or more named individuals for proven breaches, i.e. 'follow on' actions. The body had to be independent, impartial, has integrity, is reputable, and act in the best interests of the victims and has the capacity to bring an action. It was as a result of this new clause that 'Which?' was able to act soon after the *JJB* appeal.

Also from 20 June 2003, those individuals involved in infringements of a similar kind are liable to disqualification as a director or criminal prosecution under EA 02. Considering that the *Replica Football Kit* case had directors involved in the infringements, a reasonable expectation would have been to see EA 02 provisions applied vigorously as a matter of course. It is therefore, puzzling when a senior officer of the OFT declares that they have not had experience of any directors being involved in the cases they have investigated.⁴⁶⁶

No leniency applications were made by the parties in the case.

⁴⁶³ For a definition of 'cy-près' see Rachael P Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (Routledge Cavendish, 2006). As Mulheron notes the cy- près doctrine in a wider sense extends both to the calculation and distribution of damages; For 'Opt-out' system see OFT916resp, Private actions in competition law: effective redress for consumers and business, November 2007.

⁴⁶⁴ 'Collective Redress – JJB Sports: a case study in collective action' July 2011.

<www.which.co.uk/documents/pdf/collective-redress-case-study-which> last accessed 17.10.2014.

⁴⁶⁵ A case filed under the new regulations has been rejected by the CAT in July 2017. See *Walter Merricks v Mastercard* [2017] CAT 16. (an appeal has been lodged).

⁴⁶⁶ Ali Nickpay, 'UK cartel enforcement – past, present, future' Speech to the Law Society Anti-Trust Section, 11 December 2012, p 32.

5.17 Retail Pricing of Tobacco case⁴⁶⁷ - (RPM)

In its decision dated 15 April 2010, the OFT found that two tobacco manufacturers and ten of their retailers had infringed a Chapter I prohibition by engaging in unlawful practices in relation to retail prices for tobacco products in the UK. The fines imposed amounted to £225 million. The OFT concluded that each manufacturer had a series of individual arrangements with each retailer whereby the retail price of a tobacco brand was linked to that of a competing manufacturer's brand. Those arrangements restricted the ability of the retailers concerned to determine their selling prices independently, which was in breach of CA 98.

The infringements had taken place at different periods for different parties between 2001 and 2003, and related variously to the markets for UK duty paid cigarette products. The relevant product market was the UK duty paid cigarettes and similar tobacco products. The OFT had earlier started an investigation in 2003, over a Chapter II infringement, into the behaviour of one of the manufacturers, Imperial Tobacco Limited, allegedly abusing a dominant position in the UK market for cigarette papers (which case file was closed due to insufficient evidence). During that investigation which was prompted by a complaint, the UK supermarket Sainsbury's, and other retailers connected to the investigation submitted leniency applications. The current case originated owing to these leniency applications regarding the vertical agreements between tobacco manufacturers and retailers admitting they were in breach of competition law.

From the information provided in the leniency applications, the OFT believed there were reasonable grounds to suspect that a Chapter I infringement has occurred. As a result, the OFT sent over 30 section 26 notices to retailers of tobacco requiring them to produce relevant documents and information, during the course of the investigation.⁴⁶⁸ Among the documents found were written trading agreements, letters, faxes, emails, minutes of meetings, internal policy documents, pricing information, linking of retail price of competing brands. Other evidence of bonuses, monitoring, and routine communications indicating retailer did not set

⁴⁶⁷ OFT Decision No. CA98/01/2010, *Tobacco*, (Case CE/2596-03), 15 April 2010.

⁴⁶⁸ *Ibid*, paras 2.95-2.98.

price were also found. Sales managers and Area Managers were involved together with the buyers.

Due to the large number of parties and the volume of documents, the OFT later decided to limit the number of parties to a manageable group of 2 tobacco manufacturers and 10 of their retailers, bearing in mind its limited resources. In selecting the parties, the OFT focused its resources on those parties whose activities would most likely to have caused the greatest consumer detriment. The OFT, therefore, excluded those retailers with a share of less than one per cent by value of UK tobacco sales, based on the figures relating to the final year of the period under investigation. Further, two parties were excluded due to the weak nature of the evidence available. The decision to reduce the number of parties under investigation was taken around three years into the investigation.⁴⁶⁹

Documents obtained in the investigation revealed a significant amount of information about the relationship between the manufacturers and their retailers, which led the OFT to investigate further. The OFT relied on written trading agreements between the manufacturers and retailers which formalised the basis for certain aspects of the ongoing commercial dealing between them, from which Infringement Agreements were identified. After a five-year investigation, the OFT issued a Statement of Objections (SO) in April 2008. Following the SO, the second manufacturer, Gallaher (comprising Gallaher Group Ltd and Gallaher Ltd), and five retailers admitted the infringement, and reached early-resolution agreements with the OFT, in respect of which, the six parties received a 20 per cent reduction in their fines.

The OFT decided that the relevant product market, on balance, may be UK duty paid tobacco products. The relevant geographic market was the UK. Total value of sales of cigarettes and tobacco in 2003 in the UK was estimated to be around £15.27 billion.⁴⁷⁰ The share by volume of the total UK duty paid cigarette sales during the infringement period for the two manufacturers in this case was estimated at 90 per cent.

The infringements were taken as having been committed between 1 March 2001 and 15 August 2003 in respect of 9 parties, and different dates for 3 others. Total immunity was granted to Sainsbury's on making an early leniency application. Three retailers received leniency ranging from 10 per cent to 40 per cent. Early Resolution reductions of 20 per cent were granted to 6 others. Another 10 per cent reduction was given to all parties due to the long length of time taken for the investigation, although some of the parties themselves

⁴⁶⁹ Ibid, para 8.123.

⁴⁷⁰ Ibid, para 5.2.

contributed to the delay. Initial investigation having started in 10 March 2003, it took 5 years before the Statement of Objections was issued.⁴⁷¹

ITL (comprising both Imperial Tobacco Ltd and Imperial Tobacco Group plc), and the remaining retailers declined early resolution, and the investigation continued. The OFT made its decision in April 2010, and imposed a combined fine of £225 million on the parties, making it the largest fine imposed by it under CA 98. Imperial Tobacco Group plc and Imperial Tobacco Limited were found jointly and severally liable, as parent company and subsidiary respectively.

ITL and five retailers appealed to the CAT, and after 26 days of hearing, in December 2011, the CAT allowed the appeal against the OFT decision, after the OFT's Refined Case failed.⁴⁷² The CAT's judgement did not deal with the substantive issues raised in the appeals, and therefore, did not address the issue of whether there was a breach of Chapter I prohibition.

The CAT judgement resulted in the OFT also having to pay a non appealing party, TM Retail, a sum amounting to £2,668,991 and a contribution to certain other costs due to an assurance the OFT had given them if the appeals by others were to be successful.⁴⁷³ On learning of this repayment, two other non-appealing parties who had not been given such an assurance, requested OFT to repay their penalties also. The defendants took their case to the Court of Appeal and their appeal was upheld.⁴⁷⁴

The OFT investigation was a very complex one, concluding only in 2010, after over seven years of toil, leading the OFT to make 10 per cent reductions in the penalties for the length of time taken, although some of the parties were responsible for the delay themselves. And yet, after all that time and trouble the outcome came to nothing. This case illustrates the difficulty in proving parallel behaviour between undertakings before a court.

There were no Leniency applications before the investigation started, but total immunity was granted to one party who applied subsequently, with some others receiving reduced fines.

⁴⁷¹ Ibid, para 8.123.

⁴⁷² *Imperial Tobacco Group plc and others v Office of Fair Trading*, [2011] CAT 41.

⁴⁷³ OFT News release, Tobacco, 'Update – TM Retail'. (archived 2/4/14) < webarchive.nationalarchives.gov.uk/.../decisions/tobacco > last accessed 15.10.2017.

⁴⁷⁴ See *Gallaher Group and Somerfield Stores v Competition and Markets Authority* [2016] EWCA Civ 719. In an earlier appeal by the OFT, the claim by two defendants was rejected; See *OFT v Somerfield Stores and Co-operative Group* [2014] EWCA Civ 400.

5.18 Dairy Products case⁴⁷⁵ - (RPM agreement)

Four supermarkets and five dairy processors were fined £49.51 million by the OFT, for an infringement of Chapter I, CA 98, by those nine parties. The OFT held that the parties breached the law by coordinating increases in the prices consumers paid for certain dairy products in 2002 and/or 2003. The coordination was achieved by the supermarkets indirectly exchanging retail pricing intentions with one another via the dairy processors. Three infringements were found to have been committed, but not all the parties were involved in all three infringements.

One of the supermarkets, Tesco wrote to the OFT in April 2000, forwarding two letters sent to them by Farmers for Action (FFA) group. The letters expressed support for an increase in retail prices for cheddar and British territorial cheeses, in order to pass back monies up the supply chain to farmers, provided the retailers would also increase their retail prices. The intended increase would thus increase the price of raw milk. Initially the letters were sent to the FFA by Safeway and the representatives of a retailer, following an approach by FFA. The letters were being circulated between retailers, with a copy received by Safeway. Tesco sought advice from the OFT on whether the letter was in breach of the CA 98. The OFT wrote to both Tesco and Safeway and a retailer in April 2000, advising that the concerted action expressed in the letter could constitute a breach of the Chapter I prohibition.

Later, the OFT was alerted to the suspected existence of the breaches, by a retired farmer forwarding an article published in the Farmers Weekly of 4 July 2003, reporting that 'leading retailers' had increased the price of milk by 2 pence per litre. The OFT commenced a formal investigation in January 2004.

One of the dairy processors, Arla, applied for leniency, and was granted full immunity. One of the supermarkets, Asda, was granted partial leniency owing to total immunity given to it in respect of a completely separate infringement it was involved in other separate markets. Seven of the other parties applied for and agreed early resolution, thereby receiving reduced penalties. Each of these parties admitted liability and agreed to a streamlined procedure

⁴⁷⁵ OFT Decision No. CA98/03/2011, *Dairy retail price initiatives*, (Case CE/3094-03), 26 July 2011.

enabling parts of the case to be resolved quickly, reducing the costs of the investigation. One of the supermarkets, Tesco, contested the decision in the Statement of Objections vigorously at first, but when OFT dropped some of the charges against it, and issued a second Statement of Objections, Tesco came back to face the remaining (three) charges.

The four supermarkets involved (Sainsbury's, Asda, Tesco and Safeway) engaged in the infringement indirectly by exchanging retail pricing intentions with each other via the dairy processors, the mode of communication called the A-B-C information exchange. The information exchange, also called 'hub and spoke', happens when retailers exchange information via a supplier or suppliers learn each other's strategies via a retailer. This area of anticompetitive activity has been a particular concern for European competition authorities over a period of time.⁴⁷⁶

The three separate infringements in the case concerned cheese and fresh liquid milk. The OFT narrowed the relevant product market to the supply of fresh liquid milk, and British cheese, to national multiple retailers and consumers. The geographic market was deemed to be Great Britain.

The case was complex, involving several geographic and product markets together with multiple statements of objections (to all the parties), leniency applications, and early resolution. Consequently, the case dragged on for some eight years ending with the OFT decision on 10 August 2011 (with the early resolution enabling to reduce the time line somewhat!). Evidentiary documents included statements issued by FFA, communications, letters, meeting notes, reports, future pricing information, slide presentations, emails, 'briefing documents', time tables for price increases, and memos.

In making its economic assessment of the case, the OFT relied on a number of sources including a report by the Competition Commission (CC) on the proposed merger between Arla and Express Dairies, in October 2003 ('the Arla/Express Report'). This report assessed the impact of the merger in the context of three customer groups. One of these customer groups was defined as 'national multiples', consisting of Asda, Marks and Spencer, Morrisons, Safeway, Sainsbury's, Somerfield, Tesco and Waitrose.⁴⁷⁷ This group includes all of the retailers in the OFT investigation, i.e. Asda, Safeway, Sainsbury's and Tesco and, therefore, OFT noted many of the CC's findings in respect of this group were relevant to the case. The

⁴⁷⁶ See Peter Whelan, 'Trading Negotiations between Retailers and Suppliers: A Fertile Ground for Anti-competitive Horizontal Information Exchange?' (2009) 5(3) *European Competition Journal* 823; See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate and Lyle v Commission* [2001] ECR II-2035, [42] – [68]; Case C-194/99 *Thyssen Stahl AG v Commission* [2003] ECR I-10821, [82]-[83].

⁴⁷⁷ See n 475, para 4.3.

four supermarkets were the largest grocery retailers in the UK, with a market share of approximately 60 per cent in 2002 and 2003. There were senior managers involved in the infringements.

In 2010, the OFT dropped certain allegations in the case stating that subsequent detailed representations, and in light of new evidence, the OFT concluded that the evidence it then had on its files was insufficient to support those allegations relating to liquid milk in 2002, and value butter in 2003. This was despite some of the parties had entered into early settlement agreements. As a result, penalties paid on early resolution (by some parties) were reduced, and the allegation against one party, Morrisons, was dropped as the only allegation against that party related to liquid milk in 2002.

Morrisons acquired Safeway in March 2004, after Safeway was involved in the infringement (at the time of the infringement Morrisons was not implicated). As a result of its acquisition, Morrisons became the parent company of Safeway, which led to the OFT writing to Morrisons in April 2007, stating that there were reasonable grounds for suspecting it of infringing Chapter I prohibition. However, in the end OFT dropped the charge against Morrisons, for not having sufficient evidence to support their participation in the infringement.

Tesco was the only party to appeal the OFT's decision (both on liability and penalty).⁴⁷⁸ The CAT made its decision on 20 December 2012, partially allowing the appeal. According to the CAT, the OFT's evidence was sufficient to establish a concerted practice through A-B-C information exchange on three occasions, but that there was insufficient evidence to support OFT's findings in respect of five other infringements covering the 2002 period. The CAT also held that there was insufficient evidence to support the OFT's conclusions regarding Tesco's participation in a concerted practice in 2003. The CAT, therefore, set aside these aspects of the OFT's decision. The CAT reduced Tesco's penalty from £10.4 million to £6.5 million. The CAT was due to receive submissions on whether Tesco's infringements constituted a single overall act (as identified by the OFT), and on the amount of penalty imposed by the OFT, but the appeal was withdrawn by Tesco.

At the outset, the OFT applied for disclosure of documents relating to the appeal, but the application was rejected by the CAT, and the OFT was ordered to pay costs to Tesco.⁴⁷⁹

⁴⁷⁸ *Tesco Stores Limited and others v Office of Fair Trading*, [2012] CAT 31.

⁴⁷⁹ *Tesco Stores Limited and others v Office of Fair Trading (Disclosure)*, [2012] CAT 6.

The OFT also paid Morrisons £100,000, in settlement of a defamation action brought by Morrisons.⁴⁸⁰ In addition, the OFT paid Morrisons costs in relation to both a judicial review, and the defamation action launched by Morrisons following a press release by the OFT on 20 September 2007, implicating Morrisons in the infringement.⁴⁸¹ The Guardian reported that a legal source had said the costs that OFT would have to pay Morrisons was likely to top £500,000.⁴⁸² However, this has not been verified by any other source.

No Leniency applications were made by the parties prior to the investigation in the case, only applying after the OFT started its investigation.

5.19 Flat Roof and Car Park Surfacing Contracts⁴⁸³ – (bid rigging)

This case related to the infringement of bid rigging, a formal investigation into which was started in 2003 by the OFT. The parties numbering 13, were roofing contractors who had colluded in bidding for tenders in the flat roof and car park surfacing contracts (using mastic asphalt), and flat roofing contracts (using felt and single ply) in England and Scotland. The OFT found they had infringed s 2(1), CA 98 in fixing prices by way of collusive tendering, such agreements and/or concerted practices being among the most serious infringements under CA 98.

When a purchaser wished to obtain these services, the parties typically invited a number of presumably qualified contractors to submit tender bids detailing the price at which they could undertake the work specified so as to invite competition between contractors, and obtain a competitive price for the individual contract. The cooperation and coordination of the parties with one another in relation to the setting of tender prices had the object of preventing, restricting or distorting competition.

⁴⁸⁰ OFT Press release, 54/08, 23 April 2008, 'Wm Morrison Supermarkets plc: an apology < www.of.gov.uk > last accessed 29.03.2014. (This Press Release was in turn delivered via London Stock Exchange's Regulatory News Service, RNS No: 8870S).

⁴⁸¹ See Richard Fletcher, 'OFT to pay Morrisons £100,000 over milk price-fixing allegations' *The Telegraph*, 23 April 2008; OFT Press release, 134/07, 'OFT issues provisional decision against supermarkets and dairies over price fixing' 20 September 2007– (This press release was subsequently removed by the OFT from its website.

⁴⁸² Graeme Wearden and Julia Finch, 'Apologetic OFT pays Morrisons £100,000' *The Guardian*, Thursday 24 April 2008. <www.theguardian.com> last accessed 29.03.2014; Michael Peel and Tom Braithwaite 'OFT rethinks cartel probe after Morrison pay-out', *Financial Times*, 24 April 2008, ('OFT declined to say why it made the pay-out, which some legal observers described as surprisingly high ...' 5th para).

⁴⁸³ OFT Decision No. CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, (Joined Cases CE/3123-03 and CE/3645-03), 22 February 2006.

Different parties were involved in different number of contracts, and the OFT considered the collusion in relation to the tenders for each individual contract as discrete infringements. The OFT imposed financial penalties on all the parties involved subject to the Leniency Programme where leniency applications were made. Where leniency was granted, in addition to immunity or reduction in fines for the applicants, confidential information has been redacted from the published version of the Decision. Fines were calculated in accordance with the revised penalty Guidance, and the relevant turnover was determined by the amended Penalties Order 2004.⁴⁸⁴ As the infringements had ended prior to 1 May 2004, penalties were adjusted so as not to exceed the maximum penalty applicable prior to 1 May 2004.

OFT acted on information received from a source or sources (in July and again in October 2003) which identity has not been disclosed. The OFT entered, and searched the premises of 12 of the 13 parties unannounced on warrants obtained under s 28, CA 98. These were carried out over a period of time extending to September 2004. Tender documents, faxes, letters and minutes of board meetings were seized. Statement of Objections were sent on 6 April 2005 to all parties.

The OFT concluded there were two product markets in the case, defined as the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for flat roofs and other surfaces ('the Mastic Asphalt Market'), and for single ply/felt coverings for flat roofs ('the Single Ply/Felt Market'). Geographic markets were the Mastic Asphalt Market in England, the Mastic Asphalt in Scotland and the Single Ply/Felt Market in the South East of England.

The customers in the case were public authorities, and one foreseeable effect was a higher cost for building projects than if there had been competitive bidding. Ultimately, the obvious consequence would be higher council taxes.⁴⁸⁵ It was not possible for the OFT to quantify the loss to customers. In a previous investigation, the OFT discovered that 'cover pricing is endemic in the construction industry in general, including the roofing industry'.⁴⁸⁶

Duration of the tender bids did not extend over a year in most of the agreements but the OFT recognised that their effect was irreversible, yet decided not to increase the penalty on that account. Directors and senior managers were involved in the infringements.

⁴⁸⁴ OFT 423, The OFT's guidance as to the appropriate amount of a penalty (December 2004); CA 98 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by CA 98 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

⁴⁸⁵ See n 483, para 729.

⁴⁸⁶ Ibid, para 730.

The OFT considered the fact that bid rigging was widespread in the UK, and the practice by some tenderers to require bidders to complete bona fide tender certificates did not prevent bid rigging from occurring in these cases. As a deterrent OFT considered raising the penalty in the case of larger companies, and no reductions by way of adjustment for financially smaller ones.

Most of the parties had entered into multiple infringements, and their penalties were increased by a multiple of 10, incrementally for each additional breach. The OFT held that the infringements were capable of altering the structure of competition in the UK by removing competition from the competitive tendering process in each of the markets

Despite the OFT stressing on the seriousness of the infringement, seven of the parties were granted leniency in differing degrees. Briggs, the party that received full immunity due to a leniency application, had three previous convictions for similar breaches, and found to have engaged in five infringements in the current investigation, but had their penalty reduced to nil. Three other parties, Pirie, Walker, and Rio, who had previous convictions also received leniency in the range of 55 per cent, 45 per cent and 25 per cent respectively. Another party, Rock, was involved in 17 infringements in the current case, but was granted 40 per cent leniency, and another party, Cambridge which had five infringements was granted 25 per cent leniency, whereas Makers and Coverite who had only one infringement each did not receive any leniency. One of the parties, Durable, asked to treat with caution the statement of another party, Rock, because they were recipients of leniency.⁴⁸⁷

The OFT noted that the customers in the case were all local authorities which meant public money was spent on all of the contracts. Ultimately, the cost would be borne by the consumers by way of (Council) tax and the damage to consumers was not quantifiable.

One additional point worthy of note in the OFT Decision (which went on to 227 pages and 916 paragraphs) is the seemingly dominant part played by the recipient of total immunity, Briggs, who argued that the product market should be redefined, which proposition takes up 14 paragraphs for the OFT to deal with,⁴⁸⁸ before setting out the product market according to its own reasoning. None of the other parties disputed the product market. Also, Briggs made no representations in respect of two additional breaches in their Statement of Objections, giving rise to doubts about awarding full leniency to them, but later made written and oral representations that they were covered by the leniency application, which the OFT accepted as satisfactory.

⁴⁸⁷ Ibid, para 195.

⁴⁸⁸ Ibid, paras 142–156.

Some of the parties appealed, the CAT upheld the OFT Decision. No Leniency applications were made prior to the OFT investigation in the case, although total immunity was granted to one party, with reduced fines given to some others.

5.20 Flat-roofing Services in the West Midlands⁴⁸⁹ - (cover pricing)

The OFT found that a number of roofing contractors in the West Midlands area had colluded in relation to making tender bids for flat roofing contracts, and therefore, infringed the Chapter I prohibition. The OFT started the investigation on receiving information regarding the alleged infringement (source not disclosed). One of the ten parties involved, Ruberoid, applied for leniency on behalf of its subsidiary Briggs, before the start of the formal investigation, and as a result obtained 100 per cent leniency. Another party, Howard Evans, making a late leniency application was granted 50 per cent leniency.

Having decided in June 2002 that there were reasonable grounds that a collusive tendering cartel was operating, the OFT made unannounced visits to the premises of the parties in September 2002. Various documents including tender documents, fax messages, hand written lists, and letters recovered were relied on as evidence by the OFT. Some of the parties provided voluntary statements at different stages of the investigation. The parties were found to have been engaged in the infringements during the period between 2000 and 2002, and this case appears to be the beginning of the series of OFT construction industry investigations.

The parties were in the business of providing flat roofing contracting services, which means the supply of repair, maintenance and improvement (RMI) services in relation to flat roofs.

The market was fragmented, and personnel to work in the roofing industry were scarce, so it was hard for new players to enter the market. The OFT found the infringements to be individual, discrete and not the most serious examples of collusive tendering. None of the parties had a leading market share. The duration of the infringements was less than a year. The OFT found that the practice of cover pricing was endemic in the industry.⁴⁹⁰

The contracts in question involved schools, a community library, shopping centre and a car park. Local authorities were significant purchasers of these services. Local authorities make it clear in their invitations to tender that any form of collusive tendering is unacceptable. Further,

⁴⁸⁹ OFT Decision No. CA98/1/2004, *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*, (Case CP/0001-02), 16 March 2004.

⁴⁹⁰ *Ibid*, para 394.

local authority tendering is subject to EU and UK public procurement rules. The OFT considered collusive tendering to be a most serious breach, the OFT chairman stating that collusive tendering deprives customers of the benefits of competition.

Tendering procedures are designed to provide competition in areas where it is otherwise absent. An essential feature of the system is that prospective suppliers prepare, and submit tenders or bids independently. Tenders submitted as joint activities are likely to have an appreciable effect on competition.⁴⁹¹

The relevant product market was the supply of RMI services for flat roofs and the relevant geographic market was the West Midlands area.

The immunity recipient Briggs was involved in a total of 13 infringements, and senior management and directors were involved in at least some of the breaches. Howard Evans had engaged in 10 infringements, and a director was also involved. Most of the other parties had senior management and, some directors involved in the infringements. All parties had fines imposed on them with Briggs' fine reduced to zero due to full immunity being granted.

The OFT decision was appealed to the CAT by two of the parties. CAT upheld the OFT decision in its entirety in one case,⁴⁹² but refused costs to the OFT.⁴⁹³ The CAT also upheld the decision in the other case, but reduced the fine by half due to the appellant not having had an annual turnover in the relevant year.⁴⁹⁴

A Leniency application was submitted by the total immunity recipient only after the preliminary investigation was started by the OFT, but before the formal investigation.

5.21 Felt and Single Ply North East case⁴⁹⁵ - (cover pricing)

The OFT in its Decision of 16 March 2005 found seven roofing contractors colluded in relation to tender bids in felt and single ply flat roofing contracts in the North East of England, thereby infringing the Chapter I prohibition.

Felt products dominate in the flat roofing industry, and accounted for approximately 80 per cent of the flat roofing industry from 1999 until 2003 (para 27). Industrial and commercial

⁴⁹¹ OFT Guideline 401 'The Chapter I prohibition' March 1999, para 3.14.

⁴⁹² See *Apex Asphalt and Paving Co. Ltd v Office of Fair Trading*, [2005] CAT 4.

⁴⁹³ See *Apex Asphalt and Paving Co Ltd v Office of Fair Trading*, [2005] CAT 11; [2005] ALL ER (D) 270 (Apr).

⁴⁹⁴ See *Richard W. Price (Roofing Contractors) Ltd v Office of Fair Trading*, [2005] CAT 5.

⁴⁹⁵ OFT Decision No. CA98/02/2005, *Collusive tendering for felt and single ply flat-roofing contracts in the North East of England*, (Case CE/1777-02) 16 March 2005.

construction of the roofing industry accounted for 74 percent of the total roofing industry in the UK in 1999 and in 2003 it accounted for 79 per cent of the total roofing industry.⁴⁹⁶ This growth was believed to be due to increased construction of supermarkets, out of town retail parks and warehouses. The value of the industry was £1625.6 million between 1999 and 2003.⁴⁹⁷ However, the roofing contracting industry was highly fragmented, with approximately 74 per cent of companies having a turnover of less than £250,000 in 2003. Only 8 per cent of the industry had turnovers of over £1 million in 2002 and 2003 (para 30) although 50 companies had turnovers of more than £5 million in 2002 and 60 companies had more than £5 million in 2003⁴⁹⁸

The case was initiated due to the information provided by the company Briggs who disclosed this information in a previous case,⁴⁹⁹ concerning collusion among roofing contractors in the West Midlands that the same practice was happening in the North East. Briggs consequently was granted full leniency. This case was another of a series of construction industry cases that the OFT had been investigating over a number of years. The first of the leniency applicants, Briggs continued to enjoy full immunity through all the subsequent cases.

The OFT searched the premises of seven companies on warrant to seize documents, in January 2003. Documents consisted of faxes, tender bids, analysis sheets, diary entries, hand written notes, letters, and invoices in relation to the contracts in question.

Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective candidates submit tenders or bids independently. Any tenders submitted as the result of collusive activities which reduce the uncertainty of the outcome, would have an appreciable effect on competition.⁵⁰⁰

The relevant product market in this case was the supply of installation, repair, maintenance and improvement (IRMI) services for a variety of flat roof weatherproofing coverings (OFT redefined an earlier market definition made in the *Midlands Roofing* case, due to having received more information since then). The relevant geographic market was the North East of England.

⁴⁹⁶ Ibid, paras 28-29.

⁴⁹⁷ Market Business Development Limited report, 'Roofing Materials and Contracting (Industrial Report) – UK', April 2004.

⁴⁹⁸ Market Business Development Limited report, 'Roofing Materials and Contracting (Industrial Report)', October 2002.

⁴⁹⁹ See sec 5.20.

⁵⁰⁰ See n 495, para 118.

The effect of bidding markets goes beyond the short period in which the tendering process is carried out. Once the tender is awarded, the contract work then carried on cannot be rectified. There were a number of contracts the parties were involved in, the value of which ranged from approximately £20,000 to over £700,000. Local authorities were significant purchasers of IRMIs, and some of the contracts were in respect of schools and churches. Cover pricing was a widely encountered phenomenon in the roofing industry according to evidence of some of the parties.

The recipient of total immunity, Briggs was involved in 3 infringements. Roofclad, the recipient of 50 per cent leniency was one of the only two parties in the case who were involved in only one infringement. All the other parties were involved in infringements ranging from 2 to 4. Hylton, who had taken part in 3 infringements was granted 35 per cent leniency. The penalty imposed on one party, Single Ply, who had no turnover and had gone into administration, was not recoverable and therefore reduced to nil. Senior managers and directors were involved in the breaches.

No Leniency applications were made before the investigation in this case too.

5.22 Mastic Asphalt Flat-roofing Contracts in Scotland⁵⁰¹

Four contractors were involved in price-fixing agreements in relation to the supply of installation, repair, maintenance and improvement (IRMI) services for mastic asphalt coverings for flat roofs (and other flat surfaces) in Scotland. The parties were engaged in various collusive tendering agreements, in relation to the tender prices submitted to local authorities and private undertakings for the supply of IRMIs. The OFT searched premises of three of the parties on warrants obtained from the Court of Session in Scotland in November 2002. Documents seized included tender bids, faxes, letters, and other related evidence.

The information about the collusion was received by the OFT, owing to one of the parties, Briggs, disclosing the information in another investigation relating to roofing contractors in the West Midlands.⁵⁰² When a purchaser wished to purchase services for a flat roof, it typically invited a number of suitably qualified contractors to submit tender bids detailing the price at which they could undertake the work specified in order to have competition between

⁵⁰¹ OFT Decision No. CA98/01/2005, *Collusive tendering for mastic asphalt flat-roofing contracts in Scotland*, (Case CE/1925-02), 15 March 2005.

⁵⁰² OFT Decision No. CA98/1/2004, *'Collusive tendering in relation to contracts for flat-roofing services in the West Midlands'*, (Case CP/0001-02), 16 March 2004.

contractors, and obtain a competitive price. Hence any co-operation and co-ordination between the contractors in order to set the tender prices had the object of preventing, restricting or distorting the intended competition. Public authority tendering is subject to EU and UK public procurement rules. In paragraph 41 of its Decision the OFT sets out four types of anticompetitive arrangements which can result in collusive tendering.

The relevant product market was the supply of installation, repair, maintenance and improvement services for a variety of flat roof weatherproofing coverings. The relevant geographic market was Scotland. The duration of the agreement, according to the evidence before the OFT, was not greater than one year. In this case, the duration was calculated to be less than one year. However, the OFT considered that the concept of duration was of less significance in bidding markets compared to fixed-price markets, because its effect, once a contract has been awarded, was irreversible in relation to that tender.

Local authorities were significant purchasers whose budgets invariably constituted funds collected from the tax payers, even considering government subsidies. The result being any extra cost would have to be passed onto the local taxpayers. It was not possible (for the OFT) to quantify the amount of loss caused to the customers.

All parties in the case had engaged in multiple infringements, and the OFT increased the penalties by a multiple of 10 for each additional infringement. Briggs, who had 5 breaches, received 100 per cent immunity, so the penalty was reduced to nil. Another party, Pirie who had 11 infringements was granted 55 per cent leniency as the first to apply for leniency, and voluntarily providing information relating to a separate product market under the 'leniency plus' scheme. Walker, who had 10 infringements, was given 45 per cent leniency, and the fourth and final party, Lenaghan who only had 3 breaches obtained 35 per cent leniency.

No Leniency applications were made before the investigation in the case.

5.23 Felt and Single Ply Roofing Western-Central Scotland⁵⁰³

Six roofing contractors were found to have breached Chapter I prohibition by agreeing to fix prices through collusive tendering in Western-Central Scotland and were fined a total of £258,576 reduced to £138,515 by leniency. The range of customers affected was diverse and included a hospital, and a school.

⁵⁰³ OFT Decision CA98/04/2005, *Collusive tendering for felt and single ply roofing contracts in Western-Central Scotland*, (Case CE/3344-03), 8 July 2005.

Information received from Briggs (a party involved in most of the construction cases), in a previous related case in 2001 ('*West Midlands* case') led to the Scottish roofing investigation (March 2005), which in turn provided information relating to the current investigation and further separate investigations.

As the first applicant for leniency, and for providing information in a previous investigation, one of the parties, Pirie who was involved in seven infringements, was granted full immunity. A second party, Walker who was involved in 5 infringements was granted 45 per cent leniency. There were two directors of Walker involved in the breaches which was taken as an aggravating factor resulting in an increase in the penalty for Walker. But a reduction was also made for Walker for taking remedial action. The other parties did not apply for leniency but received undisclosed reductions in fines for cooperating with the investigation.

In November 2002, OFT entered and searched the premises of two of the parties, Pirie and Walker, on warrants obtained from Court of Session in Scotland. Unannounced visits were made to the premises of several other parties in October 2003. As a result of these searches documents relating to the contracts including tender documents, faxes, letters and minutes of board meeting were seized. Statement of Objections were sent in January 2005 to all the parties.

The different parties in the case were involved in different numbers of contracts, and the OFT considered the collusion in relation to tenders for each individual contract as discrete infringements. The services of contractors who specialise in flat roofing are usually procured through competitive tendering process whereby local authorities, and private managing agents along with architects and surveyors invite a number of contractors to submit sealed competitive bids. An essential feature of the tendering system is that prospective suppliers prepare and submit tenders or bids independently. Tendering procedures are designed to provide competition in areas where it might otherwise be absent.

The OFT maintained that the relevant product market for the purpose of its decision, to be the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs. Walker disputed at length the OFT's definition of the product market in the case (leading to the addition of paragraphs from 57 to 71). The relevant geographic market was Western-Central Scotland. Duration for each of the infringements was taken as less than one year.

While it was difficult to estimate the actual gain achieved by the parties, the potential gains may be derived not only from the contracts through higher margins, but also from alterations to the ongoing relationships with customers.

Local authorities were significant customers. Scarce resources are diverted from elsewhere in the public sector, lowering welfare, and in the roofing market itself there would be less incentives to compete by lowering costs and innovation. Even if customers do not end up directly facing higher prices in the short term, the foreseeable effect of the restriction or in some cases complete removal of competition from tender process will lead to consumer detriment through inefficiencies.⁵⁰⁴

No Leniency applications before the investigation were submitted.

5.24 Construction Industry cases⁵⁰⁵ - bid rigging

After nearly a seven-year investigation into 103 construction companies, the OFT fined the parties £129.2 million for contract bidding between 1 March 2000 and 31 December 2006. This was by far the largest investigation undertaken by the OFT. Some of the companies included were the biggest names in the UK construction industry. The OFT found that the parties were involved in one or more infringements in bid rigging activities comprising cover pricing, and/or agreements to pay compensation to a competing bidder, thereby contravening the Chapter I prohibition.

The OFT dealt with 199 specific infringements in which the parties had engaged in, imposing financial penalties on each of the parties in respect of a maximum of three infringements. The OFT offered the companies an extended period of three years in which to pay their penalty, subject to payment of interest on the outstanding balance. Thirty-seven of the parties involved were granted leniency while discounts were given to non-leniency parties who accepted the OFT's Fast Track Offer (FTO).

Having first received information from an auditor in Nottingham,⁵⁰⁶ the OFT started this investigation into the industry. The OFT made visits to 57 of the premises in 2005 and 2006, and obtained a considerable quantity of electronic material using its 'seize and sift' powers

⁵⁰⁴ Ibid, para 286.

⁵⁰⁵ OFT Decision No. CA98/02/2009, *Bid rigging in the construction industry in England*, (Case CE/4327-04) 21 September 2009.

⁵⁰⁶ Ibid, para II.1444.

under the Criminal Justice and Police Act 2001 (CJPA).⁵⁰⁷ Specific evidence of tender forms which were stand-alone evidence, and tender logs were found.

The OFT chose to proceed with up to a maximum of three infringements per company as it considered three proven instances of bid rigging by a company was sufficient to establish a pattern of behaviour, and also in order to balance the OFT's objectives of completing its investigation whilst sending a clear deterrence message. The OFT was mindful of the additional resources and time that would be required, and the quality of evidence available. Consequently, even where parties had admitted to more than three infringements on being granted leniency (there were potentially a total of 425 suspect tenders), three infringements with quality evidence were deemed sufficient for each party.

The investigation led to the revelation that cover pricing was endemic in the construction industry, to the extent that it had become normal practice in the industry.⁵⁰⁸ One party (Thomas Vale) even produced an economic report commissioned by them, stating that it would be perverse to impose penalties on the parties as that would restrict competition in the same market that the alleged conduct was deemed to restrict competition. Some parties suggested the OFT should have educated the industry rather than conducting an investigation.

The OFT rejected these assertions by some of the parties, but recognised that there were several features of the case that would militate against imposing penalties at the highest possible level. The OFT, therefore, placed the starting point at a lower level at Step 1 for all parties.

In its 1,834 paged decision, the OFT concluded the product market to be the provision of construction works in an identifiable sector of work, and named 15 sectors relating to the relevant product market. The geographic market was determined as the Government Office Regions, naming the 8 regional areas concerned in the case.

Six of the infringements involved what is called 'compensation' payments, four of which were payments made by companies providing cover price to the company receiving it in the event the former won the tender. In the other two, the companies agreed that the winner would pay the loser a specific sum for the cost of tendering even where no cover pricing may have been provided, and each company submitted competitive bids. The OFT considered the

⁵⁰⁷ S 50 of CJPA empowers OFT to seize electronic material from premises and to sift that material later, where it believes such material contain data relevant to an investigation, in circumstances where it is not reasonably practicable to do so on the premises, or separate out the relevant data without compromising its evidential value.

⁵⁰⁸ See n 505, paras II. 1447, II. 1449, and II 1460.

infringements involving compensation payments to be more serious than those involving 'simple' cover pricing.

Twenty-five of the companies appealed to the CAT on the amount of penalty, and every one of those appellants had the amount of their fines greatly reduced (89 per cent) by the CAT or, in some cases dismissed altogether. The first in receipt of the largest fine, Kier Group had their fine reduced by 90 per cent on appeal.⁵⁰⁹ A FTSE 250 construction group's fine was reduced from £17.9 million to £1.7 million. Two other appellants had their fines wiped out, as the CAT concluded that the OFT had not proven liability. Some fines appear to have been reduced without any reasoned basis of a method of calculation.⁵¹⁰ The CAT ordered the OFT to pay huge costs to the successful appellants.⁵¹¹

However, 78 of the companies whose fines totalled up to 50 million did not appeal, having accepted leniency or a 'fast-track offer' from the OFT to reduce their fines if they accepted liability and did not appeal the decision.

The CAT was critical of the OFT's new Penalties Order allowing the relevant financial year to be taken as the year before the decision was taken, rather than the year before the infringement ended. The OFT had made that change following the new Guidance of 2004, although there appears no specific reference to adopting such a change. The CAT found in favour of most of the appellants' arguments, even as it agreed with the OFT that the appellants had infringed the Chapter I prohibition. The CAT went so far as to observe that the OFT should have recognised that the practice of cover pricing was long-standing in the industry and widely regarded as legitimate. The CAT proceeded to adjust the penalties, albeit with a warning for such future activities by companies.⁵¹²

Leniency applicants in the case did not come forward prior to the investigation.

⁵⁰⁹ See *Kier Group plc & Ors v Office of Fair Trading* [2011] CAT 3.

⁵¹⁰ *North Midland Construction plc v Office of Fair Trading*, [2011] CAT 14, para 110.

⁵¹¹ See *Kier Group & Ors v Office of Fair Trading, (Costs Order)*, [2011] CAT 33; See also *Barrett Estates Services Limited and others v Office of Fair Trading*, [2011] CAT 38.

⁵¹² Joined cases *Barrett Estates Services Limited and others v Office of Fair Trading*, [2011] CAT 9, para 71.

5.25 Construction Recruitment Forum case⁵¹³

The OFT concluded that seven recruitment agencies had engaged in anticompetitive conduct by: a) Collective boycott by way of an agreement to withdraw, and or refrain from entering into contracts with an intermediary company, Parc UK, for the supply of candidates to construction companies in the UK and, b) Price-fixing, by way of an agreement and or concerted practice to fix target fee rates for the supply of candidates to intermediaries and certain construction companies in the UK, during the period from 21 October 2004 to 26 January 2006.

The OFT found that the conduct formed one single overall infringement of Chapter I of the CA 98, having as its object the prevention, restriction or distortion of competition in the relevant product market, which was the market for the supply by recruitment agencies of candidates with professional, managerial, trade, and labour skills required by the construction industry in the UK. The OFT considered in this case that the infringement consisted of both price fixing and collective refusal to supply candidates.

Parc UK entered the market in 2003 with a new and innovative business model to act as an intermediary between construction companies, and different recruitment agencies for the supply of candidates, which put pressure on the margins of recruitment agencies. This new approach did not go down well with the recruitment agencies, and instead of competing with Parc UK, and with one another on price and quality, the parties formed a cartel, referred to as the 'Construction Recruitment Forum' which met five times between 2004 and 2006. The forum agreed to boycott Parc UK, and also cooperated to fix the fee rates they would charge to intermediaries such as Parc UK and also certain construction companies.

The OFT granted full immunity from fines to one of the parties, HMG, as the first of the group to approach OFT for leniency, and provide evidence of the cartel to the OFT (Their fine was the biggest in this decision, before being reduced to nil owing to full immunity). HMG was also found to be the instigator of the infringement. All other parties of the group also applied for leniency, and were granted leniency ranging from 35 per cent to 20 per cent reduction in their

⁵¹³ OFT Decision No. CA98/ 01/2009, *Construction Recruitment Forum*, Case CE/7510-06, 29 September 2009.

penalties (apart from one party that went into liquidation), depending on the overall value added by the respective party to the OFT's investigation.

OFT's investigation revealed that in 2004, construction activity accounted for 6.2 per cent of the total UK Gross Value Added Product. In 2005 the value of construction output in the UK was £107 billion, and by 2006 this value had risen to £114 billion, a rise of 13 per cent as from 2001.⁵¹⁴ Companies active in the construction industry require candidates with a range of craft and trade skills, and there had been a serious skills shortage over a period of time, in particular during the infringement. The wages and vacancies had increased due to the shortage, and the situation put recruitment agencies in a strong position. Construction companies enter into contractual relationships with recruitment agencies, paying a fee, usually contingent upon the successful appointment of a candidate.

The investigation began on 20 December 2005. OFT visited the premises of each of the parties involved, in June 2006, and documents were taken from all the sites visited. The OFT found copies of documents, signed agreement, minutes, internal communications, emails, and a telling internal presentation by one of the parties.⁵¹⁵ One specific minute action pointed to 'instigate cartel meeting to counter ...'⁵¹⁶ In October 2008, the OFT issued Statements of Objections to the parties concerned.

All parties had directors or senior managers involved in the infringement, gaining uplifts in the penalty. However, by taking compliance measures they also gained reductions in the penalties. The OFT gave its decision in September 2009.

Three parties appealed on the amount of penalty, CAT reduced their penalties significantly. One party, Hays had their penalty reduced from £30.36 million to £5.88 million.⁵¹⁷ The CAT again criticised the OFT's penalty guidance on a number of fronts including the use of MDT, stating that it was an inappropriately mechanistic and narrow approach. This was despite the CAT accepting the use of MDT in at least two previous cases. The CAT also did not explain itself how the reductions in the penalties were calculated.

MDT was applied in the OFT decision in *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*,⁵¹⁸ and on appeal by one of the parties, the CAT accepted that MDT was a reasonable approach⁵¹⁹ and therefore MDT was not in question in that case

⁵¹⁴ Ibid, para 2.119.

⁵¹⁵ Ibid, para 4.16.

⁵¹⁶ Ibid, para 4.15.

⁵¹⁷ See *Eden Brown Limited and others v Office of Fair Trading*, [2011] CAT 8.

⁵¹⁸ See n 483.

⁵¹⁹ See *Makers UK Limited v Office of Fair Trading* [2007] CAT 11; [2005] All ER (D) 270 (Apr).

and the appeal was dismissed, Michael Blair QC dissenting who quoted 'There is no bright line between arithmetical mistakes and mistakes of methodology.'

The OFT states in paragraph 2.64 of the Decision that it informed one of the defendant companies of the action about to be taken against them and a leniency application was made by that company. In paragraph 2.164, the OFT states that the investigation was started due to an application, made in November 2005, by another company which then merged to form this new company that submitted the current leniency application. From a reading of the constituent parties of the company that received total immunity,⁵²⁰ it is apparent that the first leniency applicant was well aware of the impending merger,⁵²¹ and the senior officers were the same who moved from one to the other.⁵²² A merger may be subject to review under EA 02 (as amended by ERRA), and consequently must be in accordance with OFT/CMA Guidance⁵²³ procedure which means any anticompetitive behaviour is bound to be revealed during the process which, in this instance taking two and a half years.⁵²⁴ It can safely be said that the leniency application may have been submitted owing to the impending merger.

5.26 Conclusion

The cases summarised in this chapter are Chapter I, CA 98 decisions investigated and published by the OFT between 2001 and April 2012, numbering 24. Of the 24 cases, 2 were clearance applications which did not warrant leniency applications.⁵²⁵ Of the remaining 22 cases, only four cases made leniency applications prior to the OFT investigation started. And of these four cases, two parties had already been found out or targeted by other legal entities,⁵²⁶ hence it can safely be assumed that they only came forward because the danger of an investigation was looming. The third application was submitted just prior to a merger which would eventually have discovered the breach due to legal scrutiny.⁵²⁷ This leaves only one application, *Barclays*,⁵²⁸ that was soundly voluntary, by coming forward before the OFT was aware of the existence of a cartel. There again the application was made after the Head of Team who was responsible had left. The applications in the remaining 18 cases were made

⁵²⁰ See n 513.

⁵²¹ Ibid, para 4.387.

⁵²² Ibid, para 2.55.

⁵²³ OFT, Mergers: Jurisdictional and procedural guidance, OFT 527, 2009; CMA, Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2), 2014.

⁵²⁴ See n 513.

⁵²⁵ See sec 5.12, OFT decision No. CA98/2/2004, and sec. 5.14, OFT Decision No. CA98/05/05.

⁵²⁶ See sec 5.9, OFT Decision CA98/03/2006, and sec. 5.11, OFT Decision No. CA98/01/2012.

⁵²⁷ See sec 5.25, OFT Decision No. CA98/ 01/2009.

⁵²⁸ See sec 5.14, OFT Decision No. CA98/05/05.

after the OFT started an investigation. Clearly, therefore, leniency by itself does not bring cases to court.

Most of the cases dealt with in this chapter involve price fixing, and in the constructions sector cases the offences concern mostly bid rigging or cover pricing, involving a large number of construction companies. It is noteworthy that the construction cases, and some of the other cases came to light only after the infringements had ended. Had the OFT been actively engaged in ex officio investigations, it is possible that some of the infringements could have been detected earlier, and perhaps reduced the damage caused.

Notwithstanding the grant of leniency, most of the cases dragged on for years, some over 5 to 8 years, which means the scarce resources of the OFT were taken away from ex officio investigations. This was further aggravated by some of the parties granted leniency appealing the OFT decision, thereby extending even more time and, the ensuing greater expenditure (resources).

A surprise finding from these cases is that the long held belief that evidence on cartel behaviour is hard to find, is proved to be no longer true, possibly due to the use of electronic messaging by the cartelists. Significantly, most of the evidence was gathered by the OFT using its powers of seize and sift.

Importantly, even after total immunity has been granted, some defendants were found to have lied or concealed evidence at the investigation stage, bringing into question the reliability of the evidence provided by leniency applicants.⁵²⁹

Except for the one case, Lladro, where the OFT does not specify the positions held by those involved in the breach, in all other cases there were senior management involved, including directors, senior executives, Chief Executives and even four Chairmen.⁵³⁰

In all the cases where leniency was granted, and even in some cases where no leniency was granted, the parties were allowed confidentiality regarding their business secrets and accounts, with such information redacted from the case records. Leniency also comes with the proviso of nondisclosure of the leniency documents other than with the consent of the party/parties providing them, which prevents victims accessing them in private actions. It is

⁵²⁹ See sec 5.11, OFT Decision No. CA98/01/2012, and sec. 5.16, OFT Decision No. CA98/06/2003.

⁵³⁰ See sec 5.7, *UOP Dessicants*, Chairman of DGS (OFT decision No. CA98/08/2004); sec 5.10, *NILAA* Chairman (OFT Decision No. CA98/1/2003); sec 5.16, *Football Kit*, the JJB Chairman, and the Chairman of Allsports who was also a Director (OFT Decision No. CA98/06/2003).

also noteworthy that those companies granted full immunity are protected from criminal prosecution. Thus the infringing companies can keep the profits of their illegal activities on full leniency being granted, and in addition they do not have to pay any costs towards the investigation proceedings, with complete immunity granted from fines or prosecution.

Another important feature revealed in the cases is the procedural difficulties faced in arriving at assessing the penalties which meant the CAT reducing or quashing the penalties imposed by the OFT in a number of cases. The law relating to proving anticompetitive behaviour also seems very complex, and the CAT decisions do not shine any clear light on those very difficulties faced by the OFT. The case records themselves are heavily redacted to afford confidentiality to the offending parties which makes it difficult to ascertain the true procedural framework applied in the OFT decisions. As has been pointed out by the Court of Appeal in the *Replica Football Kit*⁵³¹ case, a balanced judgement cannot be arrived at without the full picture being presented to Court, where the full leniency applicant is absent.

The evaluation of the OFT cases studied in Chapter 5 are taken up in Chapter 6 that follows, which will deduce that leniency although granted generously, has not been the prime detection mechanism that brought these cases under investigation in the first instance.

⁵³¹ See sec 5.16, OFT Decision No. CA98/06/2003.

CHAPTER 6

Assessment and Evaluation of the OFT cases

6.1 Introduction

This chapter will assess and evaluate the Chapter I, CA 98 cases discussed in chapter 5 which forms the core chapter of this thesis. Most of these Chapter I, CA 98 cases are price fixing cartels, with some involved in more than one offence such as market sharing, restricting market entry or bid rigging and compensation payments. The biggest case was from the construction industry where 103 companies were found to have breached the law. Interestingly, anticompetitive behaviour does not appear to be restricted to the usual industry sectors but has even extended to the private schools sector.

The important conclusion that is deduced from the pattern of leniency applications by the cases studied in Chapter 5, is that undertakings do not rush out with leniency applications in order to confess and seek immunity.

Apart from the one applicant Barclays,⁵³² in the banking sector, none of the others came forward willingly prior to the instigation of an investigation by the OFT. Two of the applicants came forward because, one had already been found out by another legal entity,⁵³³ and the other was aware that they would come under investigation in another jurisdiction.⁵³⁴ Another party tendered a leniency application just before notifying a merger with an associate company.⁵³⁵ The surprising outcome of the analysis of these cases is that, there were considerable amount of documentary evidence in all the cases which belies the claim that it is difficult to obtain hard evidence in cartel cases. This outcome in effect destroys the very basis of the introduction of the Leniency Programme. The other claim, that leniency saves the limited resources of the enforcement authorities has also shown up to be untrue, judging by the length of time taken by these decisions. The longer a case continues more and more resources need to be utilised. Even with full immunity granted, some of the investigations took

⁵³² See section 5.15, *Loan products*.

⁵³³ See sec. 5.9, *Stock check pad*.

⁵³⁴ See sec 5.11, *Airline fuel surcharge*.

⁵³⁵ See sec. 5.25, *Construction Recruitment Forum*.

an inordinate length of time to conclude,⁵³⁶ which means more resources had to be used by way of staff, funds and time, thereby taking resources away from other interventionary cases. This chapter will also discuss findings by academics, and organisations that could further assist the study on leniency and possible solutions for enhancing enforcement.

6.2 Questions Arising from the OFT Practices

Perusal of the various OFT case records show inordinately long details of the evidence, both oral and documentary. Every word, every nuance or any little deviation or transgression has been given much detailed explanation irrespective of whether they are relevant to the case in hand or not. The result, in part, is the obvious length of time it has taken for the case to be concluded, some up to eight or more years, in one case even leading the OFT to make reductions in the penalty imposed, to compensate for the excessive time taken to conclude the investigation.⁵³⁷ The excessive time spent in reasoning and explaining is not the only problem, as has been evident in the appeal cases. This has left room for the counsel for the appellants to pick on the slightest discrepancy, even attempting to interpret words in a different context because the same word was not used consistently when referring to a certain item or a statement, leading again to lengthy discourse.⁵³⁸

In the only Court of Appeal (CA) decision relating to the cases discussed in Chapter 5, *Argos and Replica Football kit*,⁵³⁹ it was, therefore, a relief to note that the CA observed, and mildly admonished both the OFT and the CAT for the protracted nature of their decisions.

The CA quoted Griffiths L J in *Eagil Trust Co Ltd*,⁵⁴⁰ endorsed by the Court of Appeal as being of general application in *English v Emery Reimbold*,⁵⁴¹ as applicable to such a judgement of the Tribunal as to any other.⁵⁴²

Griffiths LJ said:

'[A] judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in

⁵³⁶ See sec 5.6, *Aluminium spacer bars*; See also sec 5.17 *Tobacco*.

⁵³⁷ *Tobacco* case, sec 5.17.

⁵³⁸ *MasterCard* case, sec 5.14.

⁵³⁹ *Joined Cases, Argos Ltd and Littlewoods Ltd v Office of Fair Trading, JJB Sports Plc v Office of Fair Trading, (Replica Football kit)* [2006] EWCA Civ 1318, paras [4]-[6].

⁵⁴⁰ *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, [122].

⁵⁴¹ *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409.

⁵⁴² See n 540, para 5.

support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he has acted... (see Sachs LJ in *Knight v Clifton* [1971] Ch 700 at 721).'

The CA went on to say that the same applied to findings of fact, and that the Tribunal may need not make a finding on every disputed factual issue.⁵⁴³ Nor is it always necessary for the CAT to set out each party's submissions in detail before explaining its reasons for deciding the case. The CA hoped, in future, decisions would be more succinct, having regard to Griffith LJ's quote. However, neither the OFT nor the CAT appeared to have paid attention to the CA's observations, and continued in the same vein in the cases that followed.

In relation to the grant of immunity, the CA's decision stated that the position between the parties was unlikely to be ever clear since the OFT does not reveal the reasons for granting immunity to one party in the same cartel.⁵⁴⁴ This is an important observation, because immunity leaves not only other participants in the dark but more importantly, the victims have no way of knowing how the breach may have affected them.

It should be added that evaluation of the OFT cases is made even harder due to redaction of evidence provided by not only the leniency recipients but other parties as well, where their sensitive business interests are concerned. Comparison of penalties is also impossible due to redaction of turnover of the relevant financial year as well as the percentages increased or decreased at the calculation stage.

The OFT, nevertheless must be given credit for attempting to play the difficult role of investigator, prosecutor and adjudicator all at the same time. This probably explains why the OFT finds it necessary to record all events, explaining every single detail in each of the investigations concerned.

As for the much praised leniency programme which is supposed to encourage infringers to come forward on their own accord, only four such applicants came forward prior to the OFT starting an investigation. Of these, there is only one example of a purely voluntary application made in the *Loan Products* case.⁵⁴⁵ Even in that case, a leniency application was submitted only after the senior manager responsible for the breach had left Barclays. Of the others, *Stock check pad* case,⁵⁴⁶ had no option but to come forward, as a legal team had already found them out. The next nearest to a voluntary application is that of VAA, who, suspecting what

⁵⁴³ Ibid, para 6.

⁵⁴⁴ Ibid, para 290.

⁵⁴⁵ See sec 5.15, *Loan products* (OFT Decision No. CA98/01/2011).

⁵⁴⁶ See sec 5.9, *Stock Check Pads*, (OFT Decision No. CA98/03/2006).

was coming due to the US investigation into BA's surcharge case, tendered an application, seemingly to undercut BA in a parallel UK investigation. Even then, having obtained full immunity, VAA suppressed or withheld some of its evidence, giving rise to the failure of the OFT initiated first ever criminal case. In *Construction Recruitment Forum*,⁵⁴⁷ the application came just prior to the company giving notice of a merger, which meant that it would be subject to legal scrutiny. None of the other OFT cases provide an example of anyone voluntarily approaching the OFT with an application before an inquiry has started.

If leniency programme was meant to gather hard evidence without the enforcement authority having to search for it, the question also arises why most of the OFT investigations had dragged on for years when parties had been granted full immunity or part immunity for providing the necessary information. Longer the investigation, costlier it is for all parties concerned. Recognising this fact, the BIS submits one of its policy objects for new reforms as, 'Improve Speed and Predictability'.⁵⁴⁸ BIS continues, 'The government is concerned that antitrust cases take too long, and result in too few decisions, thus having less deterrent effect on anti-competitive activity than they should.'⁵⁴⁹

Having obtained part leniency and cooperating fully, some of the parties then went on to appeal the OFT decision.⁵⁵⁰ When challenged on the amount of penalty, in almost all the cases, the CAT has granted huge reductions or in some cases has quashed the penalty decision altogether, ordering the OFT to pay huge costs wherever the appellant was successful. The appeals take almost the form of a new trial, sometimes allowing new witnesses with cross examinations so that appeals themselves elongate the whole antitrust decisional procedure, thereby incurring further costs.

In the *Construction*⁵⁵¹ cases, the same party was given full immunity in successive multiple infringement cases, because that party provided information relating to the first case on granting immunity. This prompted some participants to complain that they were treated unfairly.⁵⁵²

⁵⁴⁷ See sec 5.25, *Recruitment Forum* (OFT Decision No. CA98/ 01/2009).

⁵⁴⁸ BIS, **Ref: BIS/11/657**, A competition regime for growth: a consultation on options for reform, 2011, para 1.8 at 13.

⁵⁴⁹ Ibid, para 5 at 45.

⁵⁵⁰ See sec 5.24, *Construction* cases; sec 5.16, *Replica football*; sec 5.18, *Dairy Products*.

⁵⁵¹ See sec 5.24, OFT Decision No. CA98/02/2009.

⁵⁵² See sec 5.19, OFT Decision No. CA98/01/200 6, para 195.

6.2.1 Reliability of Leniency Witnesses

An intriguing example of relying on the evidence of leniency applicants can be seen in the *Airline fuel surcharges*⁵⁵³ case, when the OFT tried to bring criminal charges on four airline executives. At the trial at Southwark Crown Court, it emerged that a large amount of email correspondence in the possession of Virgin Atlantic Airlines (VAA), the whistleblower in the OFT's investigation, had not been disclosed to the OFT in its civil investigation. VAA had been granted full immunity in the case. The result was that the OFT could not produce any evidence as against these new revelations, and the case collapsed.⁵⁵⁴ The OFT came under much criticism by the defence, in addition to the humiliation of the failure of its first ever attempt at initiating a criminal prosecution.⁵⁵⁵ Had the material been disclosed to the OFT by VAA at the outset, the criminal trial could have been continued to its conclusion.

The OFT subsequently reviewed its decision to grant immunity to VAA, with the purpose of revoking it. This was because VAA was required to disclose all evidence under the total immunity granted to it, but the OFT could not pursue the matter as it had relied too heavily on the applicant's lawyers instead of insisting on taking over all the documents for inspection. OFT concluded it was a 'close call' ('a genuine close call') which did not turn an instance of non co-operation into a situation in which there had been co-operation. 'Rather, it remained an instance of non-cooperation, but which was not such as to warrant the revocation of immunity.'⁵⁵⁶ It may well be that the OFT was being wary having taken note of the US judgement where the US Court of Appeal dismissed an indictment against *Stolt-Nielsen*⁵⁵⁷ which had received leniency from the Antitrust Division. The OFT accepted it had made mistakes (blaming itself for the collapse of the case), and appointed a Board Review named 'Project Condor Board Review', in which a number of recommendations were made to reform the future handling of cases, including the grant of leniency to applicants, and the response of

⁵⁵³ See sec 5.11, OFT Decision No. CA98/01/2012.

⁵⁵⁴ OFT press release, 47/10, 'OFT withdraws criminal proceeding against current and former BA executives' 10 May 2010; Alistair Osborne, 'Collapsed BA price-fixing trial places OFT and Virgin in the dock' *The Telegraph*, 11 May 2010, ('As Julian Joshua, a cartel lawyer at Brussels-based Howrey put it: "You are relying largely on witnesses who have an agenda. They have to admit they are dishonest and then the prosecution has to bring them as witnesses of the truth.") < www.telegraph.co.uk > last accessed 18.05.2016.

⁵⁵⁵ The earlier *Marine Hose* case (R v Whittle), the only successful prosecution by the OFT was an off shoot of the US *Marine Hose* case.

⁵⁵⁶ OFT, 'Virgin Atlantic Airways immunity review – 1398', December 2011, para 2.10.

⁵⁵⁷ *Stolt-Nielsen SA et al v United States*, No. 05-1480 (US 3rd Cir 2006).

the executive management of the OFT.⁵⁵⁸ In the meantime, it was reported that BA was refusing to pay the fine imposed on it by the OFT in its civil investigation, due to the collapse of the criminal case against VAA executives.⁵⁵⁹

In the *Replica Football kit*⁵⁶⁰ appeal cases, it came to the CAT's attention that some of the documents produced at the appeal stage by Allsports had not been disclosed to the OFT, whereas the OFT was made to believe Allsports cooperated fully by disclosing all the evidence in their possession. The OFT was completely unaware of that fact, and had even reduced their penalty by 5 per cent for fully cooperating, and praising them for one single admission (of organising a meeting with anti-competitive intent), while they denied having ever infringed CA 98.⁵⁶¹ There had been nondisclosure by Allsports of all the information available to them, with only limited admission. The CAT observed that Allsports' behaviour was 'open to severe criticism' and revoked the 5 percent reduction awarded to it by the OFT, thereby increasing its penalty by the same amount.⁵⁶² Allsports had not disclosed evidence even to their own lawyers at the OFT investigation stage.⁵⁶³ This was the first and the only such action the CAT has taken against an appellant in uplifting a penalty so far, albeit indirectly, by revoking the 5 per cent discount given by the OFT for cooperation.

With regard to the *JJB Sports* appeal in the same case, it came to light that JJB provided inaccurate evidence to the OFT, resulting in JJB Sports receiving a lower penalty, prompting the CAT to remark that OFT should have imposed a higher penalty on JJB at step 4, for pressurising Umbro.⁵⁶⁴

The CAT also found that Umbro was not candid and suppressed evidence. Umbro's evidence was incomplete and unreliable in important respects. They were incomplete and incorrect and were not offering 'complete and continuous cooperation' as required by paragraph 3.8(b) of the penalty Guidance.⁵⁶⁵ Umbro had been awarded 40 percent leniency, but their evidence left much to be desired. Further, the CAT found Umbro had given a misleading answer to a letter sent to them in the investigation. The CAT found that Umbro resisted disclosure whenever it could generally, and the information it supplied to the Tribunal itself was

⁵⁵⁸ OFT, 'Project Condor Board Review', December 2010.

⁵⁵⁹ Alistair Osborne, 'British Airways on collision course with OFT over £121m fuel price-fixing fine' *Telegraph*, 31 July 2011.

⁵⁶⁰ See sec 5.16, *Football Kit*.

⁵⁶¹ *Umbro Holdings Limited and others v The Office of Fair Trading*, [2005] CAT 22.

⁵⁶² *Ibid*, paras 210, 231 and 234.

⁵⁶³ *Ibid*, para 232.

⁵⁶⁴ *Ibid*, paras 193 and 203.

⁵⁶⁵ *Ibid*, para 327.

unsatisfactory.⁵⁶⁶ In the event, the CAT said no further reduction of the penalty was possible. And yet, the CAT reduced Umbro's penalty by a further 20 percent, because the CAT had reduced JJB's penalty by the same percentage! This was despite the fact that CAT also concluded there was insufficient evidence to prove that Umbro was acting under pressure, which they claimed.

According to s 3.2 of the OFT's penalty guidance, consumer welfare outweighs penalty. The CAT in this case appears to take the contrary view. While observing that Allsports' penalty should have been higher for nondisclosure, and remarking that Umbro also was trying to suppress evidence before the CAT itself, as it did before the OFT, the CAT nevertheless believed these matters should be dealt with by other legal procedures.⁵⁶⁷

As for MU (Manchester United), simultaneously with introducing compliance, senior executives carried on with the infringement. MU had also given assurances to the OFT previously, in 1999, that it would not act in breach of compliance rules. The executives involved in the breach did not inform their Chairman, the Company secretary or their lawyers of their arrangements.

The sports sector has clearly disregarded their previous pledges to the OFT that they would not act in breach of competition law. The most rational criteria by which competition law cases might be selected would be futile if violation is neither deterred nor remedied.

The theme of reliance on leniency applicants had come up in the roofing industry cases as well, where some parties warned against OFT taking the leniency recipients' version of evidence for granted (Hylton questioned Briggs' evidence).⁵⁶⁸ Again, in the *West Midlands* roofing case, *Apex* questioned *Briggs'* evidence,⁵⁶⁹ *Briggs* being the biggest winner having received total immunity throughout. But the OFT rejected both assertions.

In the construction sector cases, the parties who were granted full immunity or partial immunity continued to receive further immunity in the subsequent related cases. Most of the parties were granted leniency for repeat offences. The CAT decisions went even further in the construction appeal cases. The CAT admonished the OFT for not taking into account that cover pricing in tender bidding was so widespread that it should not have been taken as an

⁵⁶⁶ Ibid, para 337.

⁵⁶⁷ Ibid, para 230.

⁵⁶⁸ OFT Decision No. CA98/02/2005, Collusive tendering for felt and single ply flat-roofing contracts in the North East of England, para 196.

⁵⁶⁹ OFT Decision No. CA98/1/2004, Collusive tendering in relation to contracts for flat-roofing services in the West Midlands, para 194.

infringement worthy of penalising. This was in spite of the fact that the OFT did lower the starting point of the penalty in recognition of the widespread nature of the practice.

6.2.2 OFT's Biggest Investigation – the *Construction Industry* cases

The *Construction Industry*⁵⁷⁰ investigation by the OFT started after the receipt of a specific complaint in the East Midlands in 2004. Over the next five years it was to spread throughout England and Scotland to become one of its largest ever CA 98 investigations, involving 250 of its staff.⁵⁷¹ It was by far the largest investigation undertaken by the OFT, lasting some five and a half years. The investigation covered a wide range of projects where customers included local councils, schools, universities and hospitals. It involved more than 3,000 suspect contracts, in total valued at around £3 billion. More than 1,000 firms were involved but as the OFT did not have the resources to pursue them all, the OFT took the decision to focus on only 103 firms for which it had the most robust evidence. In the circumstances, the OFT decided to restrict the number of alleged infringements to only three 'But for' infringements per party. In March 2007, OFT closed the door on new leniency applicants and issued a 'fast track offer' to 85 firms who had not applied for leniency, in return for admission of liability for specific infringements and cooperation with the OFT in other ways, guaranteeing 25 percent reduction in penalty. Of these non-lenieny parties, 45 accepted the fast track offer. The Guardian reported that the total fines imposed by the OFT on the parties only amounted to an average of 1.14 per cent of their total global annual turnover.⁵⁷²

On appeal, the CAT agreed with the OFT that cover pricing is in breach of competition law, but felt the practice was less serious and very different from that of 'bid rigging'. The CAT felt that the fines imposed were 'excessive and disproportionate' and also did not accept the OFT's method of calculation. The CAT heavily criticised the OFT for applying MDT to groups as opposed to one party, so contradicting its own decisions in *Apex* and *Makers*, where MDT was accepted.⁵⁷³ The exercise of striking a fair balance between deterrence and seriousness is a difficult one. But the CAT's judgement does not throw light on how OFT should have done so.

⁵⁷⁰ See sec 5.24, OFT Decision No. CA98/02/2009.

⁵⁷¹ See Contract Audit Line, 'OFT's Constructions Case' *Contract Audit Line Ltd* < www.cal.org > last accessed 19.08.2014; In 2011, BIS reported OFT had 265 staff. See BIS, **Ref: BIS/11/758**, A competition regime for growth: A consultation on options for reform – impact assessment, 2011, Table 32 at 72.

⁵⁷² See Graeme Wearden and Tim Web, 'OFT fines on bid-rigging builders 'a minor inconvenience' *Guardian*, 22 September 2009 < <https://www.theguardian.com/business/2009/sep/22/oft-fines-building-bid-rigging> > last accessed on 17.05.2016.

⁵⁷³ *Apex Asphalt v Office of Fair Trading* [2005] CAT 4; *Makers v Office of Fair Trading* [2007] CAT 11.

In particular, the CAT's own calculations of the appellants' penalties contain no reasoning at all, and do not refer to each company's turnovers, profits or any indicative cash figures. The CAT recommended that the OFT 'step back' and ensure that the penalty was proportionate. Was CAT's reduction of *Kier Group's*⁵⁷⁴ penalty by 90 per cent really warranted? *Kier Group* was a company having a much higher turnover than most of the others in the case. Fines for the rest of the appellant firms were reduced by 89 percent. Interestingly, the majority, i.e. 78 of the 103 firms originally named by the OFT, and fined a total of £50 million did not appeal. They possibly did not have the resources to appeal, and some had earlier accepted a 'fast track offer' which reduced their fines.

Apart from the full immunity party, all other parties came up with any defence they could muster in order to obtain a reduced penalty, with one party, Stainforth, claiming that 'OFT is culpable for failing to educate the construction industry that simple cover pricing gave rise to an infringement.'⁵⁷⁵ Some parties claimed that their penalties should be reduced because of the charity work and community work they do. Some argued that no material level of construction activity had taken place to have any significant effect.⁵⁷⁶ One party even made an application for a judicial review, to reopen the OFT's fast-track offer, which was rejected by the court.⁵⁷⁷

The OFT noted that there was no evidence that the construction industry had reduced involvement in cover pricing overall even after its previous roofing decisions.⁵⁷⁸ But it recognised that compliance efforts by the industry such as the Building Magazine's 'Rebuilding Trust' campaign, and the UK Construction Group and National Federation of Builders code of conduct on competition compliance, were signed up to by a number of the parties.

Later, the OFT noted that the full immunity recipient had breached its duty under leniency by engaging in further cartel activity, but decided not to take action on that occasion.⁵⁷⁹

The industry publications gave the impression cover pricing was normal and an acceptable practice, hence significantly, more mitigation was allowed by the OFT to the parties. Apart from the full immunity recipient, between 65 and 35 percent leniency reductions in penalties were given to some while almost all the non leniency parties received reductions for cooperation and/or for putting in compliance procedures or other mitigating factors. Moreover, the OFT allowed a 3-year period for the parties to pay the penalties imposed, in consideration

⁵⁷⁴ *Kier Group and others v Office of Fair Trading* [2011] CAT 3.

⁵⁷⁵ *Ibid*, para VI.225.

⁵⁷⁶ *Ibid*, VI.274.

⁵⁷⁷ *Crest Nicholson Plc v Office of Fair Trading* [2009] EWHC 1875 (Admin), para 31.

⁵⁷⁸ *Ibid*, para VI.250.

⁵⁷⁹ (Case CE/4327-04), *Bid rigging in the construction industry in England*. See footnote 8362 at page 1622.

of the financial climate of the time. Having obtained all these concessions and reductions, did not stop some parties from appealing to the CAT.

The CAT took exception to the OFT calculating the starting point of the penalties by taking the business year prior to the OFT's decision rather than the business year prior to the infringement ending. The OFT's reasons for choosing this particular year is not clear, although it states that the 10 percent worldwide turnover for the year before the decision was calculated in accordance with s 36(8) of CA 98, and the 2000 Order,⁵⁸⁰ as amended by the 2004 Order.⁵⁸¹ In the next paragraph of its decision, the OFT states that the penalty should not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 percent in the financial year preceding the date when the infringement ended.⁵⁸² The second category was in respect of the infringements occurring prior to the amendment of the Penalty Order. The OFT decisions since the amendment had all been decided with the starting point taken as the year before the OFT decision, and not as the year prior to the infringement took place.⁵⁸³

The CAT went to great lengths in order to soothe the appellants' grievances in the case. In its reasoning for reducing Kier Group's fine by nearly 90 percent, it almost contradicted itself in regard to the relevant financial year, and yet pointed an accusing finger at the OFT.⁵⁸⁴

At the appeal stage, the OFT relied on interview transcripts while the appellants brought in witnesses who were open to cross examination. It is questionable why these witnesses were not available at the OFT investigation.

The CAT gave all appellants the benefit of the submissions as to the relevant year for step 1, although only some advanced the argument. Again, some panels (different appeal panels were involved) did not hear arguments for the starting point percentage for simple cover pricing, and proceeded with the premise that the 5 percent figure set by the OFT was correct.

⁵⁸⁰ The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, (2000 No. 309).

⁵⁸¹ Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, (2004 No. 1259).

⁵⁸² *Ibid*, paras VI.369 and VI.370.

⁵⁸³ *Ibid*, para VI.87.

⁵⁸⁴ *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, paras 223-233.

6.2.3 Cost Effectiveness of Leniency

It is interesting to note that even where total immunity was granted, the OFT investigations could not be concluded within a short period of time. The shortest case, *John Bruce*⁵⁸⁵ which took 10 months from the date of issuing the s 26 notice under CA 98, to its conclusion, had no leniency applicants, although reductions were given owing to mitigating factors according to the penalty Guidance. The longest case, *Tobacco*⁵⁸⁶ took 85 months for the OFT investigation to conclude although total immunity was granted to one party, and six others entered into early settlement agreements. In the end, however, the OFT decision was quashed by the CAT, on appeal by some of the other parties in the case.

On average, Chapter I cases have taken 38.2 months (including appeals).⁵⁸⁷ Invariably, the more time spent involves using more resources, which takes away staff and funds from investigating new cases. BIS reports that the costs incurred by the OFT on competition enforcement action amounted to around £56.4 million in the year 2009/10 alone.⁵⁸⁸ The amounts may vary according to the case load taken in each year, yet considering the very low number of antitrust cases concluded in a given year, expenditure appears excessive. However, OFT's Annual Report and Accounts state that the benefits of the OFT's overall performance to be higher than the estimated costs over time.⁵⁸⁹ But the BIS admits that, '... the system for the enforcement of the antitrust prohibitions is not working as well as it should. This is illustrated not only by the consultation responses but also by the protracted nature of cases and the strong challenge that is often mounted to decisions on appeal.'⁵⁹⁰ It goes on to say that 'The Government remains concerned that too few cases are taken forward.'⁵⁹¹ The concern is that the lengthy process and only a few cases will lead to less deterrence and diluted economic impact than if there were more cases. This tallies with some of the economic arguments, that when there is less ex officio enforcement, businesses are less likely to self-

⁵⁸⁵ See sec 5.3, OFT Decision No. CA98/12/2002.

⁵⁸⁶ See sec 5.17, OFT Decision No. CA98/01/2010; BIS, **Ref: BIS/11/657**, A competition regime for growth: a consultation on options for reform, 2011, Table 2 at 147.

⁵⁸⁷ Ibid.

⁵⁸⁸ BIS, **Ref: BIS/11/758**, A competition regime for growth: a consultation on options for reform - impact assessment, 2011, Table 7 at 21, (para 38).

⁵⁸⁹ Office of Fair Trading, 'Annual Report and Accounts 2013 to 2014', Table: Estimated costs and benefits over time, p.44.

⁵⁹⁰ BIS, **Ref: 12/512**, Growth, competition and the competition regime: government response to consultation, 2012, para, 6.17 at 54.

⁵⁹¹ Ibid.

report even where immunity is available under leniency.⁵⁹² Nevertheless, the BIS has decided to keep the current arrangements stating, 'The Government is satisfied that the CMA should prosecute in most cases, because of the need to secure consistency in the application of the leniency and no action policy which is the bed-rock of many civil and criminal cartel cases.'⁵⁹³

One of the major reasons for merging the OFT with the former CC to form the current CMA is a cost cutting exercise by the government, with BIS expecting a potential cost saving of £4.3 million.⁵⁹⁴ The BIS states, '... the length adds cost to the public purse and to those parties subject to the investigations.'⁵⁹⁵ According to BIS, 'There are difficulties in successfully prosecuting antitrust cases at reasonable cost and in reasonable time, ... which means that the decisional case law is too thin and precedents too few, and the deterrent effect of the prohibition is reduced.'⁵⁹⁶

The second reason in favour of Leniency policy has been that it saves the scarce resources of the enforcement authorities. This can only occur if Leniency can help dispose of the investigations speedily. It is well known both to litigants and practitioners that longer the litigation, costlier it is for all parties concerned. The BIS has therefore stated in 2011, that it intends to improve speed and predictability for business as one of its policy objectives for new reforms.⁵⁹⁷

6.2.4 Evidence in Cartel Cases

The main concern that cartels operate in secret and, therefore, hard evidence is scarce has been at the root of introducing a leniency programme in the first place. It is amply clear from the OFT cases that this is no longer true. In an era of instant electronic messaging it is easy to exchange messages and the risk factor appears to play a minimal role. In almost all of the OFT cases discussed in Chapter 5, there has been a considerable amount of documentary evidence that the OFT was able to access, not only electronic evidence but also print or hand-written material. The OFT/CMA has strong empowerment procedures for 'dawn raids' or entering premises and accessing such evidence,⁵⁹⁸ and that is a far more effective method than relying on colluders to come forward and confess of their own free will. In the *Football*

⁵⁹² See Chapter 3, sec 3.4, sec 3.4.1 and sec 3.4.4.

⁵⁹³ See n 590 para 7.39 at 75.

⁵⁹⁴ BIS, Ref: **BIS/11/758**, A competition regime for growth: a consultation on options for reform - impact assessment, Table 8 at 23. According to BIS, there had already been a budget cut of 25 percent over a four-year period for the OFT.

⁵⁹⁵ Ibid, para 23.

⁵⁹⁶ Ibid, para 15 at 11.

⁵⁹⁷ Ibid, para 20 at 12.

⁵⁹⁸ See Chapter 2, sec 2.4.2.; See also Chapter 1, sec 1.3.

*Kit*⁵⁹⁹ case, evidently the senior managers, and even directors appear to have been arrogantly disregarding their previous commitment given to the OFT not to break the law, and carrying on leaving behind a trail of evidence too. British Airways and Virgin Airways (VVA) exchanged a large number of emails, some of which were not disclosed to the OFT by VVA although it was granted full immunity as the whistleblower.⁶⁰⁰

6.2.5 No Senior Officers?

In light of the findings of the OFT decisions, the participants of the cartels involved have been mostly senior officers. Senior managers, chief executives, directors and even Chairmen of some of the companies have been directly involved.⁶⁰¹ It is therefore questionable why there have been no prosecutions against any of them. There is not even a single application made for Disqualification Order against any of them on being found guilty. It is therefore highly questionable the statement made by a Senior Director of the OFT in a speech, where he stated:

‘Our experience in civil cases to date is either that the conduct in question is not carried out at a sufficiently senior level, or that it has not been possible - on the available evidence - to establish that a director knew or ought to have known about the conduct.’⁶⁰²

A reading of the OFT cases show otherwise. Except for the one case, *Lladro*,⁶⁰³ where the OFT does not identify the individual positions held by those involved, all the others had senior officers involved, most of them at the highest level. Not only there have been strong evidence against these senior managers, but also some of them have admitted their involvement,⁶⁰⁴ although those who are granted immunity get exemption from prosecution. Opportunity to put EA 02 to good use has been therefore missed on a number of occasions.

Berzins and Sofo have found that management were involved in 80 per cent of 69 publicly available cases from Australia, Canada, Denmark, the EC, Ireland, Japan, Korea, the Netherlands, New Zealand, the UK and the USA between 2000 and 2006.⁶⁰⁵ They also found

⁵⁹⁹ See sec 5.16.

⁶⁰⁰ See sec 5.11.

⁶⁰¹ See n 530.

⁶⁰² Ali Nickpay, ‘UK cartel enforcement – past, present, future’ Speech to the Law Society Anti-Trust Section, 11 December 2012, p.32.

⁶⁰³ See sec 5.8.

⁶⁰⁴ See sec 5.2 and sec 5.3.

⁶⁰⁵ Michelle Berzins and Francesco Sofo, ‘The inability of compliance strategies to prevent collusive conduct’ (2008), Vol 8, Issue 5, *Corporate Governance: The International Journal of Business in Society* 669- 680; See

that 71 per cent of matters examined, cartel participants were aware of illegality of their behaviour.

6.2.6 Compliance Attracts Discounts on Penalties

The OFT has been generous in awarding reductions in fines to participants of the cartels who put in place compliance procedures and/or training staff on such procedures in the workplace concerned.⁶⁰⁶ However, in *Arriva*, when senior managers who had trained in compliance procedures were caught engaged in the cartel under investigation, no uplift of the penalty occurred.⁶⁰⁷ In the EU however, compliance is not a factor taken into account when setting fines.⁶⁰⁸ Nevertheless, in an earlier case violation of compliance was taken as an aggravating factor together with recidivism.⁶⁰⁹ The Chairman of OECD has said that the EU has a very strong standard; that it will not reward compliance.⁶¹⁰ He was also of the view that competition authorities are uneasy with compliance programmes, mostly because they realise they could be fake and not sure how to detect this, but that some countries have a more open attitude.

6.2.7 Dying Cases?

What is clear is that most of these cases, in particular the *Construction industry*⁶¹¹ cases, were dying cases (or dead well before the investigation started), and quite a number of the parties had discarded or destroyed the relevant documents, and some of them did not have turnover accounts or had nil turnovers for the relevant year. Some companies had changed character; managers had left or simply there was a lack of historic documents, resulting in protracted investigations. It may be argued that investigating dying cartels can be a warning to likely future colluders. However, the OFT's resources could be better spent in proactively detecting and deterring existing cartels so as to prevent further damage to the economy.

also John K Ashton and Andrew D Pressey, 'Who Manages Cartels? The Role of Sales and Marketing Managers within International Cartels: Evidence from the European Union 1999-2009' (2012) CCP Working Paper 12-11.

⁶⁰⁶ See Chapter 5.

⁶⁰⁷ See sec 5.2, *Arriva and FirstGroup*.

⁶⁰⁸ Case T-138/07 *Schindler v Commission*, (2011), [88]; Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4959, [52]; See Wouter Wils, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement' (2013) 1(1) *Journal of Antitrust Enforcement* 52-81. Between 1982 and 1992, the Commission granted reduction in fines in seven decisions for setting up compliance after start of the investigations, but never since.

⁶⁰⁹ *British Sugar* [1999] OJ L 76/1.

⁶¹⁰ David Vascott, 'An interview with Frédéric Jenny' *Global Competition Review*, 4 March 2014.

⁶¹¹ See sec 5.24.

The OFT's response regarding the *Constructions* investigation has been to point out that a report prepared for it by *Europe Economics*⁶¹² in 2010, suggests a significant improvement in the behaviour of construction companies since the case, and an awareness of competition law. It has also pointed to the UK Construction Industry Competition Law Code of Conduct that was produced in response to the case by the UK Contractors Group and the National Federation of Builders in 2009.

Nevertheless, what is apparent is that none of these parties came forward with leniency applications before the OFT started investigations. It was an auditor who alerted the OFT, in the constructions cases. It can be argued that investigating dying cartels also help alerting current and future cartelists from desisting, which is worthwhile, however, considering the scarcity of resources available to the investigating authority, deterrence by way of catching the culprits much earlier would be more desirable to minimise the harm caused.

6.3 Leniency, Recidivism and Multiple Infringements

Although leniency is claimed to put a stop to anticompetitive behaviour, the evidence is not compelling. Repeat infringements occur both in the US and the EU (as it may happen in other parts of the world). There is criticism that repeat offenders are not dealt with severely enough.⁶¹³ As Connor points out, deeply rooted profit-making business behaviour must result in high level of recidivism. Roots lie in the structures of the markets.⁶¹⁴ This is particularly played out in international cartel cases. The US DoJ has, however, strongly denied Connor's claims, and has stated that the US has eliminated cartel recidivism.⁶¹⁵ However, the DoJ has refrained from making any references to the financial cartels by the banking sector. In the EU, Wils points out that out of the 74 cases in which the Commission applied the 1998 Guidelines up to the end of 2006, 17 cases involved a finding of repeated infringement by at least one undertaking, making a total of 28 findings of repeat offending.⁶¹⁶ These findings led to an increase in the amount of the basic fines by fifty per cent.⁶¹⁷

⁶¹² 'Evaluation of the Impact of the OFT's Investigation into Bid Rigging in the Construction Industry' *Europe Economics*, 2010.

⁶¹³ Wouter P J Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2011) < SSRN: <http://ssrn.com/abstract=1957088> > last accessed 20.01.2016. pp 3-5

⁶¹⁴ See John M Connor, *Studies in Industrial Organization: Global Price Fixing* (2nd edn, Springer 2008). pp 17-52.

⁶¹⁵ Gregory J Werden, Scott D Hammond and Belinda A Barnett, 'Recidivism Eliminated: Cartel Enforcement in the United States since 1999' Speech before the Georgetown Global Antitrust Enforcement Symposium, Washington, D. C, 2011.

⁶¹⁶ Wouter P J Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) < SSRN: <http://ssrn.com/abstract=962654> > last accessed 20.01.2016, p 22.

⁶¹⁷ Ibid. However in the *Belgian Beer* case the increase was only 40 per cent while *British Sugar* had 75 per cent increase due to a number of other factors as well. See Case T-38/02 *Groupe Danone v Commission (Belgian beer)* [2005] ECR II-4407, [312]-[313], and *British Sugar*, OJ L76/1, [206]-[210].

Applying a quantitative trade model, Clarke and Evernett show that low-income countries that lack effective anti-cartel enforcement paid prices more than double what the other importers for vitamins paid.⁶¹⁸ Many corporate *Vitamins* conspirators were fined previously for price-fixing violations under US or EU competition law.⁶¹⁹ Hoffmann-La Roche, one of the two companies identified as the ringleaders of the *Vitamins* cartel, engaged in overlapping price-fixing agreements with respect to 12 vitamin products.⁶²⁰ Just two years before it was fined for its role in the *Vitamins* cartel, Roche was fined \$14 million by the US in 1997 for its leading role in the citric acid cartel of 1991-1995. Roche executives were required to provide full cooperation to the DoJ in antitrust matters due to Roche's guilty plea in the citric acid case, yet the executives continued to conspire on vitamin prices for two more years. Moreover, there was trial testimony given in the 1998 case of *U. S. v Andreas*, to the effect that Hoffman-La Roche had been a member of an earlier clandestine international cartel in the citric acid market in the late 1980s.⁶²¹ This earlier citric acid cartel was never punished by antitrust authorities.

Roche was not the only convicted member of the vitamins case to be fined in another price-fixing case. French chemical manufacturer Rhône-Poulenc, which in 1999 merged with the leading German chemical firm Hoechst to form Aventis, was awarded immunity in 1999, by the Commission, for involvement in the Vitamins A and E cartels.⁶²² Hoechst itself which conspired in respect of vitamin B12, was convicted and fined \$36 million by the US in 1998 for its role in the global *Sorbates* cartel. In 2003 the EU imposed a fine of \$116 million on Hóechst (by then Aventis) for the *Sorbates* violation. Thus, 3 of the leading co-conspirators in the vitamins cartel are known to have engaged in previous or concurrent cartels that operated in the 1990s. Doubtless there are others in the huge vitamins cartel who have not been discovered. As for the DoJ's assertion that recidivism by these corporations have been eliminated, there is no criteria to make sure that they are not engaged in other undetected cartels, possibly using even more covert methods.

⁶¹⁸ Julian L Clarke and Simon J Evenett, 'The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel' (2003) 48 *Antitrust Bulletin* 289.

⁶¹⁹ *Ibid.*

⁶²⁰ *Hoffman-La Roche Ltd v Empagran S.A.*, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004); Harry First, 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law' (2001) 68 *Antitrust Law Journal* 711; See also Commission Press Release, 'Commission imposes fines on vitamin cartels' IP/01/1625, Brussels, 21 November 2001.

⁶²¹ *United States v Andreas* 1999 WL 116218 (N.D. Ill 1999); See also Brief *Amicus Curiae* of Darren Bush, John M Connor and others in *Hoffman-La Roche v Empagran S A* No 03-724, SC (US), 2004, pp 22-28.

⁶²² Aventis was the first company to cooperate with the investigation into some of the markets but was fined in another (vitamin D3) cartel.

These 3 examples are not isolated or anecdotal. The phenomenon of repeat cases in US and EU antitrust is a subject of statistical study of modern private international cartels.⁶²³ Participants in international cartels involving 283 products, were uncovered by one or more of the world's antitrust authorities between January 1990 and July 2003. Out of the hundreds of companies identified, 173 companies participated in contemporary cartels in two or more of these products. Some were convicted of domestic or international cartel behaviour prior to 1990 as well. Eleven had participated in price fixing of ten or more products (serial price fixing).

In the OFT's *Football Kit* investigation it transpired that a number of the parties involved had previously been dealt with by the OFT, with the defendants undertaking not to infringe the law in future, but engaged in further breaches regardless.

The field of legal economics that studies crime and punishment is founded on the idea that persons choose crime because the anticipated 'benefits exceeded the expected losses'.⁶²⁴ When the benefits (monopoly profits) exceed the losses (antitrust fines and penalties), deterrence will not be achieved. Optimal monetary penalty that can equate the anticipated profits can achieve the objective of deterrence. The OFT cases show that the fines for colluders barely get close to the 10 per cent maximum that can be imposed as penalty.

On revising its leniency policy in 2006, the EU threatened to increase the fine for recidivists by 100 percent for each previous offence.⁶²⁵

6.3.1 Cartel Detection and Deterrence

Connor submits that despite the higher fines imposed by the Commission and the NCAs, because of the near absence of private rights of action, the EU has not been as successful as North America in imposing monetary penalties that might deter international cartels operating in Western Europe.⁶²⁶ According to Connor, settling for a hard and fast rule as in *Empagran*,

⁶²³ See John M Connor J M and C Gustav Helmers, 'Statistics on Modern Private International Cartels, 1990-2005' (2006) AAI Working Paper No. 06-11 < <http://ageconsearch.umn.edu/bitstream/28650/1/wp060011a.pdf> > last accessed 26.04.2016.

⁶²⁴ Thomas S Ulen, 'Rational Choice Theory in Law and Economics' 0710, (1999) < <http://reference.findlaw.com/lawandeconomics/0710-rational-choice-theory-in-law-and-economics.pdf> > last accessed 25.02.2016, p 790.

⁶²⁵ See Neelie Kroes, 'Delivering on the crackdown: recent developments in the European Commission's campaign against cartels' Speech at The 10th Annual Competition Conference at the European Institute, October 2006, SPEECH/06/595.

⁶²⁶ See John M. Connor, 'The High Economic Costs of Cartels: Can Private Enforcement Help?' (2010) AAI < <http://ssrn.com/abstract=1694156> > last accessed 20.03.2015; John M. Connor, 'Private Recoveries in International Cartel Cases Worldwide: What do the Data Show?' (2012) AAI Working Paper No. 12-03.

that sacrificed the purposes underlying the antitrust laws, the ability of those laws to deter unlawful conduct, created an environment ripe for recidivism by international cartels.⁶²⁷ He asserts that if antitrust laws are denied on the ground that cases are difficult, then that means courts should not have jurisdiction over many types of cases that are brought before it.

Commission sanctions are well below the profits accruing from even a brief, typically harmful cartel. As in the US, generous reductions in fines are routinely granted for minimal cooperation with the Commission.⁶²⁸ As Sokol finds, ‘... a too-generous leniency program may create opportunities for firms to behave strategically.’⁶²⁹ The EU fines are still below their optimal level and come too slowly, according to Mariniello,⁶³⁰ and he argues that EU fines account for a tiny proportion of the turnover of affected markets in the convicted EU cartel decisions between 2001 and 2012. The estimated affected sales in the European Economic Area (EEA) by these cartels while they were active, could amount to around 209 billion euros while the fines totalled to only 18.4 billion euros.⁶³¹ When penalties are not severe enough, and the amount of resources saved by investigating leniency cases is not large enough, a Leniency programme would be counterproductive.

According to Connor and Helmers, between 1990 and 2005 alone, the aggregate cartel sales were \$1.2 trillion and overcharges were \$500 billion.⁶³² They found, that out of a set of data on 283 private international cartels, global cartels comprised more than half affected sales, and were larger and longer lasting, and more injurious than other types.

Levenstein and others show two findings from their analyses; first, cartels are neither relics of the past nor do they fall under the weight of their own incentive problems.⁶³³ Even where cheating eventually undermines a cartel, consumers may have been burdened by years of increased prices, and enduring barriers to entry have often been created by strategic cartel

⁶²⁷ See John M Connor and Darren Bush, ‘How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism’ (2008) 112 *Penn State Law Review* 813; See *Empagran S.A. v Hoffmann La-Roche Ltd*, 315 F.3d 338 (D.C. Cir. 2003); *Hoffmann La-Roche Ltd v Empagran S.A.*, 123 A. Ct. 2359 (2004). The Supreme Court held that foreign victims were ‘independent’ of any adverse effects on US commerce.

⁶²⁸ See Wouter P J Wils, ‘The European Commission’s 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis’ (2007) 30(2) *World Competition: Law and Economics Review* < <http://ssrn.com/abstract=962654> > last accessed 26.05.2015.

⁶²⁹ D Daniel Sokol, ‘Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement’ (2012) 78 *Antitrust Law Journal* 201-240, p. 212.

⁶³⁰ Mario Mariniello, ‘Do European fines deter price fixing?’ (2013) *VOX CEPR’s Policy Portal* < <http://voxeu.org/article/do-european-fines-deter-price-fixing> > last accessed 26.05.2015.

⁶³¹ *Ibid.*

⁶³² See John M Connor and C Gustav Helmers, ‘Statistics on Modern Private International Cartels: 1990-2005’ (2006) Department of Agricultural Economics, Purdue University Working Paper 06-11. These statistics have been challenged as somewhat exaggerated, by some other economists.

⁶³³ See Simon J Evenett, Margaret C Levenstein and Valerie Y Suslow, ‘International Cartel Enforcement: Lessons from the 1990s’ (2001) 24 (9) *The World Economy* 1221-1245.

behaviour. Second, aggressive prosecution of cartels can deter collusion, but only where sufficient international cooperation exists to gather evidence and prosecute. In another sample of cartels prosecuted in the US, twenty cartels of which sales data were available, the annual worldwide turnover in the affected products exceeded US \$30 billion.⁶³⁴ In the Lysine cartel alone, John Connor estimates that the cartel overcharged U.S. customers between \$65 million and \$134 million.⁶³⁵ Levenstein and Suslow find that there is enormous variance in cartel success in raising prices and profit maximising which reflects the innumerable possibilities for organising a successful cartel, due to the interdependence of those factors that determine cartel success.⁶³⁶ Although difficult at times to uncover, cartels are far from rare. Nussbaum estimates that international cartels controlled approximately 40 per cent of world trade between 1929 and 1937.⁶³⁷ Hence, efficient investigatory policies may be more effective in the detection of cartels even in the absence of leniency. Targeting specific industries in sequence may prevent firms from colluding for some time, which in turn reduces the attractiveness of collusion, and contribute to making it more fragile.

In the OFT decisions, most of the immunity recipients were also the parties with the higher, if not the highest, annual turnovers among the participants in the cartels that they were involved in. The CAT has been very liberal in reducing the fines in most of the appeals against fines. A drawback in CAT decisions appear to be that legal arguments take precedence over a proper economic analysis of the cases before it. As Peter Freeman, the current CAT Chairman has stated, 'striking the right balance between rules and individual case analysis' is an important issue in arriving at antitrust decisions.⁶³⁸ Courts have a real degree of latitude in dealing with complex antitrust cases. In *Esso Petroleum*, Lord Reid said that where a set of conditions had been incorporated into an agreement without negotiation, a party acceding to the main agreement may be at a disadvantage regarding other terms.⁶³⁹ Therefore, taking the case as a whole package, and assessing the economic damage by analysis would be a more appropriate way of dealing with antitrust cases.

⁶³⁴ Ibid.

⁶³⁵ John M Connor, 'Our Customers Are Our Enemies': The Lysine Cartel of 1992-1995' (2001) 18(1) *Review of Industrial Organization* 5-21.

⁶³⁶ Margaret C Levenstein and Valerie Y Suslow, 'What Determines Cartel Success?' 44(1) (2006) *Journal of Economic Literature*; SSRN: < <http://ssrn.com/abstract=299415> > accessed 05.12.2015; See also Joseph E Harrington, 'How Do Cartels Operate?' (2006) 2(1) *Foundations and Trends in Microeconomics* 1-105.

⁶³⁷ Helga Nussbaum, 'International Cartels and Multinational Enterprises' in Alice Teichova, Maurice Levy-Leboyer, and Helga Nussbaum, (eds), *Multinational Enterprises in Historical Perspective* (Cambridge University Press, 1986), pp. 131-45.

⁶³⁸ Peter Freeman, 'Better to travel hopefully than to arrive? The Reform of UK Competition law 1991- 2016' Zeeman Lecture, Regulatory Policy Institute 25th Anniversary Conference, Merton College Oxford 12th/13th September 2016, p 20.

⁶³⁹ *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [337]. This case related to a restraint of trade matter.

6.3.2 Fines as a Deterrent

Industry representatives have increasingly voiced concern that the European Commission imposes excessive fines, particularly since the introduction of new guidelines in 2006. Fines are too high, disproportionate, and liable to introduce distortions into the market leading to higher prices for consumers, they complain. They argue also that in crisis times, a more lenient approach should be taken.

'Optimal fine' is defined as the minimum payment that would ensure complete deterrence, and which should be enough to offset the expected additional profit accruing to cartel members as a result of their illegal action, if they are caught by antitrust authorities. Key parameters for calculating the optimal fine are therefore the price increase (cartel overcharge) and the probability of detection. The empirical evidence on cartel overcharges reveals a significant diversity of price increases.⁶⁴⁰

It is widely believed that the probability of detecting clandestine cartels is less than one-third.⁶⁴¹ No reliable estimate exists of the probability of detection by antitrust authorities. By definition, such an estimate would require information on cartels that have not been uncovered. Estimate could be the probability that a cartel will be detected during the course of a year, conditional on the cartel being eventually detected. Since not all cartels are detected, economic theory suggests that the fine should be inversely correlated to the probability of detection. A 15 per cent detection rate would suggest fines 6.7 times higher than the expected gains of the cartel.⁶⁴² A report by the OECD in 2000 said, 'It is estimated that average illegal gain from price fixing is 10 per cent of the selling price, but in such cases the harm to society may amount to 20 per cent of the volume of commerce affected by the cartel.'⁶⁴³

Bos and Schinkel state in their paper that Article 23(2) of Regulation 1/2003 constrains the EC's objective of deterring competition law infringements by introducing the 2006 fining

⁶⁴⁰ See Emmanuel Combe and Constance Monnier, 'Fines against hard core cartels in Europe: the myth of over enforcement' (2009) Cahiers de Recherche PRISM—Sorbonne Working Paper < <http://ssrn.com/abstract=1431644> > accessed 07.12.2015.

⁶⁴¹ John M Connor, John M Connor and Darren Bush, 'How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism' (2008) 112 *Penn State Law Review* 813, p 63.

⁶⁴² Lucian Bebchuk, and Louis Kaplow, 'Optimal sanctions when individuals are imperfectly informed about the probability of apprehension' (1992) 21 (2) *Journal of Legal Studies* 365-370.

⁶⁴³ OECD Reports: Hard Core Cartels, 2000, p12.

guidelines.⁶⁴⁴ They find that the legal maximum leaves the Commission little scope to apply its new fining method effectively.

The think tank Bruegel published a paper on collusion and fines in the EU.⁶⁴⁵ The analysis is based on final decisions on cartels, adopted by the EU between 2001 and 2012, for a total of 73 cartels and 479 convicted companies. Since January 2001, the Commission has imposed fines totalling 18.4 billion euros on companies convicted of cartels within the EEA. Compared to the harm caused by the infringing companies, this is very low. Fines account for a tiny proportion of the affected markets. Estimates suggest the total harm to commerce could be about 209 billion euros.

6.3.3 Introduction of the 2006 Commission Guidelines on Penalties

The aim of the 2006 Commission guidelines was to make a link to the profits established, and the penalties to be imposed. This was particularly evident in 2007 and 2008 when the value of affected markets, was especially high. Therefore, rather than EU being tougher, fines reflect the greater economic effect of cartels since 2007. These factors were not captured by the Commission prior to 2006. Fines since 2006 could have been higher had it not been for the economic crisis. There was an increase in requests for reductions due to 'inability to pay' which the Commission started to accept in 2008. In 2010 alone, 45 per cent asked for reductions. A little less than a third were successful. Fines are in effect very far from their optimal level, below the level for deterrence. If at the time of forming the cartel the companies could perfectly foresee future profits and costs, they would still find it profitable to commit to it, even knowing they would be caught. The analysis indicates current deterrents are insufficient, and suggests fines should be increased.⁶⁴⁶ But this could cost consumer more by way of hidden costs, and difficult to implement. Hence a practical solution for short term would be to reduce the time needed to complete cartel investigations.

The current timeline for investigations is 4-6 years, therefore taking into account the average cartel duration, this means an infringer should expect to be sanctioned 10 to 20 years after

⁶⁴⁴ Iwan Bos and Marten Schinkel, 'On the Scope for the European Commission's 2006 Fining Guidelines Under the Legal Fine Maximum' (2006) 2(4) *Journal of Competition Law and Economics* 673-682.

⁶⁴⁵ See Mario Mariniello, 'Do European Union fines deter price fixing?' (2013) *Bruegel Policy Brief*, Issue 2013/04. <<http://www.bruegel.org/download/parent/780>> last accessed 26.11.2015.

⁶⁴⁶ See Emmanuel Combe and Constance Monnier, 'Fines Against Hard Core Cartels in Europe: The Myth of Overenforcement' (2009) Cahiers de Recherche PRISM-Sorbonne Working Paper <<http://ssrn.com/abstract=1431644>> accessed 12.12.2015; See also John M Connor, 'Has the European Commission become more severe in punishing cartels? Effects of the 2006 Guidelines' (2011) 32 (1) *European Competition Law Review* 27.

formation of a cartel. In the meantime, managers would have moved on or retired, having reaped the benefits without fearing any cost. If investigation time is halved, a corresponding 10 per cent increase in fine could be made in terms of net present value of the starting time of cartel, since discounts given would be for a shorter time.⁶⁴⁷ Wils argues that the theory on optimal fines remains useful as a general guidance despite the fact that in practice, it does not appear feasible to measure econometrically a theoretical optimal fine for a given antitrust infringement⁶⁴⁸

6.3.4 Determination of Fines: Optimal Sanctions, Cartel Dissuasion - the Theoretical Framework

The starting point of the optimal sanctions is rationality. A rational agent, i.e. one who undertakes a cost-benefit analysis based on expected profits and losses and who is risk neutral, does not break the law if the illegal gain derived from the crime is less than its expected cost, the latter being equal to the average sanction times the probability of conviction. Therefore, deterrence through the use of fines will work if, and only if, the expected fine exceeds the expected gain.⁶⁴⁹ If this theory is applied to price fixing, cartel formation will be deterred if the expected sanction (average fine times the probability of detection) is at least equal to the illicit profit obtained by cartel members. Wils argues that cooperation by colluders with the competition authority's investigation is advantageous for antitrust enforcement in that it reduces the administrative cost as well as the duration of the investigation, and may bring the violation to an earlier end. This may hold true if the colluders come forward voluntarily at an early stage of the violation. Judging by the OFT investigations, colluders rarely self-report unless there is an imminent risk of being discovered.

As to the range of industries, and sectors affected most by cartels is not easy to ascertain, mainly due to information on affected markets is not always available. In the OFT cases, parts of the decisions remain redacted with details of market information remaining confidential. Therefore, it is not possible to examine the theoretical framework within which enforcement authorities determine optimal fines for anticompetitive behaviour. The fines imposed account for a small percentage of the annual turnover of the convicted companies as seen in the OFT

⁶⁴⁷ See Natalia Fabra and Massimo Motta, 'Antitrust Fines in Times of Crisis' (2013) CEPR Discussion Paper No. DP9290 < <http://ssrn.com/abstract=2210260> > accessed 12.12.2015; Joseph E Harrington, 'Optimal Deterrence of Competition Law Infringements' Presentation at the conference 'Deterring EU Competition Law Infringements: Are We Using the Right Sanctions?' Brussels, 3 December 2012.

⁶⁴⁸ Wouter P J Wils, 'Optimal Antitrust Fines: Theory and Practice' (2005) < <http://ssrn.com/abstract=883102> > accessed 26.11.2015, p 12.

⁶⁴⁹ See Chapter 3.

cases in Chapter 5. Moreover, these are only the detected cartels, while there is no data available of the undiscovered cartels or their frequency. As Mariniello observes until this data obstacle of not knowing the frequency of cartels in the economy, the ultimate impact of leniency programs on cartel formation and the lifetime of cartels will remain an open question.⁶⁵⁰

6.3.5 The Predictability of the US DOJ Cartel Fines v UK's EA 02

The DoJ's predictive power of the optimal-deterrence model is quite good. Conner and Miller found that corporate cartel fines are strongly directly related to economic injuries from collusion.⁶⁵¹ But US fines do not conform to the theory's predictions about the probability of detection and conviction of cartels. Also fines complement other penalties, such as the number of months that a corporate's defendant managers are sentenced to prison and private damages paid. For criminal violations of the Sherman Act, DoJ has great latitude in recommending corporate cartel fines to the federal courts. Hence, compared with the robust implementation of sanctions including jail terms for defendants it can be said that the US system is well ahead in their determination to deal with anticompetitive behaviour than the EU and the UK systems. The main features of US success point to its: a) Per se rule, b) Criminal sanctions, and c) A robust private actions role.

In the UK, EA 02 has been notably dysfunctional in prosecuting infringers.⁶⁵² The OFT's first and only criminal conviction resulted from a US plea bargain in 2008.⁶⁵³ Bryan Allison, David Brammer and Peter Whittle were jailed between 30 months and 3 years for their role in organising a worldwide cartel in the supply of flexible marine hoses, but the sentences were reduced on appeal.⁶⁵⁴ They were arrested by US antitrust authorities in Houston in 2007, after attending a cartel meeting. They admitted guilt and agreed jail sentences under a plea bargain. The US DoJ allowed them to return to the UK on condition that they plead guilty to the UK cartel offence, and that they would return to the US if their UK sentences were shorter than those agreed under the plea agreement. The only other UK antitrust criminal prosecution

⁶⁵⁰ See Mario Mariniello, 'Do European fines deter price fixing?' (2013) *VOX CEPR's Policy Portal* <<http://voxeu.org/article/do-european-fines-deter-price-fixing>> last accessed 26.12.2015.

⁶⁵¹ See John M Conner and Douglas J Miller, 'Determinants of US Antitrust Fines of Corporate Participants of Global Cartels' (2013), 7th International Industrial Organization Conference, Boston, 11th annual meeting of the AAI, April 3-5, 2009 <<http://ssrn.com/abstract=2229300>> last accessed 26.11.2015.

⁶⁵² See Andreas Stephen, 'The UK Cartel Offence: Lame Duck or Black Mamba?' (2008) ESRC Centre for Competition Policy (CCP) Working Paper 08-19; See also Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford University Press 2014).

⁶⁵³ See *R v Whittle and Others*; OFT Press Release, 'Three imprisoned in first OFT criminal prosecution for bid-rigging', 11 June 2008; OFT Press Release, 'OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel', 19 Dec 2007.

⁶⁵⁴ See *R v Whittle* [2008] EWCA Crim 2560; [2008] All ER (D) 133 (Nov).

under the OFT, concerning four BA executives collapsed when the OFT failed to provide evidence, while in the US, another BA executive, Keith Packer, was imprisoned in Oct 2008 for a parallel offence relating to air cargo fuel surcharges.⁶⁵⁵

Save for the collapsed BA executives' case no other prosecution by the OFT or the SFO has taken place as regards the cases set out in Chapter 5, despite the involvement of senior managers in a number of the OFT cases.⁶⁵⁶ A report by Deloitte has found that executives fear most the threat of imprisonment and a criminal record, as the biggest deterrent to engaging in cartel activity.⁶⁵⁷ Hence, streamlining the criminal offence relating to cartels is needed for effective prosecution. The challenge is to reduce complexity and delay, which in turn will help towards the important step of cost saving. There is also the undertone of historical tolerance of monopolies (and cartels) in the British Isles as highlighted in *Mogul Steamship*⁶⁵⁸ and the recent House of Lords ruling in *Inntrepreneur*,⁶⁵⁹ to contend with.

6.3.6 Competition, Business Interests or the Single Market?

It appears that business interests are at the forefront of government agenda, from Lord Simon's emphasis that '... the critical importance in minimising burdens on business. The problems for business in having two similar but, in their detail different prohibitions interpreted according to two different bodies of case law could be burdensome.'⁶⁶⁰ Further, he stated that the purpose of s 60 (CA 1998) was "to ensure that as far as possible the UK prohibitions are interpreted and develop consistently with EC prohibitions. That is of crucial importance in minimising burdens on business."⁶⁶¹

It is also questionable whether the much repeated 'consumer welfare' was at the heart of competition law, given that it is not generally found in successive CJEU judgements handed down over the years.⁶⁶² In *GlaxoSmithKline*, the Court of Justice stated that Article 101 'aims to protect not only the interests of competitors or of consumers but also the structure of the

⁶⁵⁵ DoJ Press Release, 30 Sept 2008, 'Former BA Exec Agrees to Plead Guilty to Participating in Price-Fixing Conspiracy in Air Cargo Shipments'.

⁶⁵⁶ See n 530.

⁶⁵⁷ OFT, OFT962, 'The deterrence effect of competition enforcement by the OFT' A report prepared for the OFT by Deloitte, 2007, pp 110-135.

⁶⁵⁸ *Mogul Steamship v McGregor Gow* [1892] AC 1; See also *Norris v United States* [2008] UKHL 16, [25-26].

⁶⁵⁹ See *Inntrepreneur Pub Company (CPC) and others v Crehan* [2006] UKHL 38.

⁶⁶⁰ Lord Simon, HL Deb, October 30th 1997, Col 1145.

⁶⁶¹ Lord Simon, HL Deb, November 25th 1997, Col 960.

⁶⁶² See Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services Unlimited formerly GlaxoWellcome plc v Commission* [2009] ECR I-9291, [63]; See Alexander Italianer, 'Competition Policy in support of the EU 2020 policy objectives' Speech at the Vienna Competition Conference 2010 - 'Industry vs. Competition?', 9 June 2010, p.3; See also Pinar Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric', (2009) 32 (1) *World Competition* 71.

market and, in so doing, competition as such.’ More telling is the hierarchy of objectives set out by the European Commission Annual Report on Competition Policy 2000, where the first objective is the ‘maintenance of competitive markets’ and the second, the ‘single market objective.’ However, the Commission’s 2004 Guidelines on the Application of Article 81(3) sees a change of heart, reining in consumer welfare as one of the objectives.⁶⁶³ Indeed, the single market was the core goal of the Treaty of Rome, with building a single market taking shape from 1958, and key decisions taken by government ministers with little reference to public opinion.⁶⁶⁴

6.3.7 US Senate Debate for More Stringent Regulations on Cartels

The US senate heard arguments for toughening of antitrust laws further, in November 2013, by the members of its Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights.⁶⁶⁵ The Chair of the committee, senator Klobuchar stated ‘Cartels have no other purpose than to rob consumers.’ Despite DOJ’s Attorney General Baer claiming that the Leniency Program has increased the rate of self-disclosure, others testifying before the Subcommittee pressed the Senate to adopt stricter punishments in light of the ‘steady stream of cartels’ that they viewed as a persistent problem. There were questions about the effectiveness of fines as a deterrent, and that the fear of receiving jail terms was only if the infringers actually believed they were likely to be caught. Some testified that steep fines and punishments may in truth discourage self-reporting. As a better deterrence it was suggested that individuals and corporations convicted of cartel violations should be banned so as to prevent them from conducting business in certain markets, serving on boards or in other corporate functions.

The only published qualitative research involving case studies and interviews with practitioners on the effectiveness of the immunity policy outside of the UK, that this thesis encountered, is the survey by Sokol, who has found, ‘The practitioner surveys suggest that

⁶⁶³ Para 13 of the 2004 Guidelines provide that ‘The objective of Art 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market investigation serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.’

⁶⁶⁴ John McCormick, *European Union Politics* (Palgrave, 2011) p.77 – ‘European Economic Community (EEC) was created by the Treaty of Rome in 1957, at heart, it was in its early years an elitist project that had little impact on European public opinion, with key decisions taken by government ministers’; See also P A Buigues, Oliver Guersent and J F Pons, ‘Alternative Models for Future Regulation’ < ec.europa.eu/competition/speeches/text/sp2001_020_en.pdf > paras I-2 and I-3. Accessed 23.06.2015.

⁶⁶⁵ Gregory E Heltzer, Jennifer L Westbrook and others, ‘U.S. Senators Debate Toughening Cartel Penalties’ (2013) *The National Law Review*, November 19, 2013 < <http://www.natlawreview.com/article/us-senators-debate-toughening-cartel-penalties> > accessed 15.02.2015.

while, overall, the leniency policy works, it is not as effective as DOJ rhetoric suggests. Strategic leniency seems to drive many leniency applications.⁶⁶⁶ According to Sokol's survey, 'Practitioners also suggested that the DOJ has institutional reasons to laud the success of the cartel program and to downplay any criticisms of it.'⁶⁶⁷

As Wouter Wils states:

'[S]uccessful cartels tend to be sophisticated organisations, capable of learning. It is thus safe to assume that cartel participants will try to adapt their organisation to leniency policies, not only so as to minimise the destabilising effect, but also, where possible, to exploit leniency policies to facilitate the creation and maintenance of cartels. This raises the question whether there could be features of leniency programmes that risk being exploited to perverse effect.'⁶⁶⁸

However, Wils is of the opinion that repeat offenders should not be deprived of being considered for leniency.⁶⁶⁹

A report by the UK's National Audit Office has noted that, the OFT and the CMA found only three breaches in financial services between 2001 and 2015, despite serious and long-running problems. Nevertheless, following applications for leniency, in 2013, the European Commission fined financial institutions €1.71 billion for participating in cartels in interest rate derivatives, particularly in London markets.⁶⁷⁰

6.4 Applicants Racing to Obtain Immunity

The financial mis-selling involving banks, such as Libor, IPP, and more recently Forex⁶⁷¹ and all other anticompetitive dealings including money laundering activities still uncovering, and the high fines imposed on them, show that notwithstanding the EU and the US DoJ extolling the virtues of the leniency policy, anticompetitive behaviour appears to be rife among firms worldwide. Because the number of cartels remains unknown, it is difficult to determine if

⁶⁶⁶ D Daniel Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201–240, p 236.

⁶⁶⁷ *Ibid*, p 213.

⁶⁶⁸ Wouter P J Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart publishing 2008), p 137.

⁶⁶⁹ See Wouter P J Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 (1) *World Competition* 5–26.

⁶⁷⁰ NAO Report, 'UK Competition Authorities: The UK Competition Regime' HC 737, (2016), para 2.5 at 30.

⁶⁷¹ Sebastian Chrispin, 'Forex scandal: How to rig the market' *BBC News*, 20 May 2015 < <http://www.bbc.com/news/business-26526905> > last accessed 28.12.2015; Karen Freifeld, David Henry and Steve Slater, 'Global banks admit guilt in forex probe, fined nearly \$6 billion' *Reuters*, 20 May 2015.< <https://www.reuters.com/article/us-banks-forex-settlement-idUSKBN0O50CQ20150520> > last accessed 28.12.2017.

enforcers have achieved optimal deterrence. As Stucke finds, 'Given the difficulty in detecting cartel behavior, it is impossible to give any accurate accounting of the number of hard-core cartels.'⁶⁷² The US Senate debate in 2013 is testimony that tougher penalties have not been successful in deterring cartels.⁶⁷³

The issues surrounding the structure and efficacy of leniency programmes were explored at a Competition Law Scholars Forum held in London, at City Law School in September 2010.⁶⁷⁴ At this conference, Peter Willis presented his research on EU leniency applications for which data were available regarding the timing of leniency applications. The data showed a surprising gap in time between the first leniency applicant in a given cartel, and the second applicant from the same cartel. The data suggested that the conventional story told by antitrust enforcers that there is a race to the enforcement authorities, sometimes by a matter of minutes, hours or days, may not explain the confession dynamics in many cartels. The data, though interesting, cannot tell the whole story because the EU does not publish this information for all leniency applicants.⁶⁷⁵

As competition law regimes vary significantly across jurisdictions it may mean that the optimal leniency programme in one jurisdiction may be suboptimal in another. Some jurisdictions offer both corporate and individual programmes while some others only offer corporate leniency programmes. Therefore, it requires more comparative work to be done to ascertain which overall antitrust regime creates a more effective leniency policy. While leniency programmes may be an incentive for firms to come forward and confess, it may also lead infringers to broaden their strategies. For example, they can abuse generous leniency packages to their advantage by first obtaining immunity through leniency, thereby avoiding financial and criminal punishment, and then engaging in a different kind of complicated cartel that can escape the antitrust authorities' net.

As Christopher Leslie states, coordination or harmonisation between leniency programmes in different jurisdictions is important. He points out: 'Depending on the scope of a cartel, a participating firm could seek leniency in one jurisdiction and conceivably open itself up to antitrust liability in dozens of other jurisdictions. This possibility could dissuade a price-fixing firm from confessing in any jurisdiction, which would result in a harmful cartel continuing

⁶⁷² Maurice E. Stucke, 'Morality and Antitrust' (2006) 3 *COLUM. BUS. L. REV.* 443-547, p. 470.

⁶⁷³ See sec 6.3.7.

⁶⁷⁴ Christopher Leslie, 'Editorial – Antitrust Leniency Programme' (2011) 7(2) *Competition Law Journal* 175-179.

⁶⁷⁵ *Ibid*, p 176.

unabated.⁶⁷⁶ He reiterates the requirement of greater transparency and more transborder cooperation.⁶⁷⁷

6.4.1 Effectiveness and Co-ordination of Law Enforcement as Distinct from Harmonisation Across Europe

Corporate management may in part constitute all corporate governance arrangements dealing with: management misbehaviour; institutional structure of the organisation; incentive targeting schemes; interests between agent and principal, and; various contracts that cannot be easily seen. At the lower level, there may be dysfunctional corporate governance. Such lack of transparency leads to corporate crimes that have been uncovered in cases such as *Enron*,⁶⁷⁸ *WorldCom*,⁶⁷⁹ and *Parmalat*,⁶⁸⁰ indicating accounting manipulations and a link between performance targets and compensation. Two large networks of auditors (Grant Thornton International, and Deloitte Touche Tohmatsu) failed to detect the frauds in *Parmalat*, while auditors in *Enron* and accountants in *WorldCom* colluded with the management in producing misstatements to show false excessive profits.

Failures of these massive companies and subsequent court proceedings have revealed some common features that led to their catastrophic financial failures such as massive growth, accounting failures, poor underlying performance, political connections, complex corporate structures, and a dominating shareholder controlling the management.⁶⁸¹ Profits motivate shareholders, and rather than monitoring the corporate governance or the managers of the company they have invested in, they exploit the company by their short term interests in gaining as much profit as they possibly can.

In these cases, the capital markets discounted the perceived risk and relied heavily on the Gatekeepers, i.e. the auditors. Enron scandal led to the passing of the Sarbanes-Oxley Act in the US in 2002. The main provisions of the Act included the establishment of the Public

⁶⁷⁶ Ibid, p 178.

⁶⁷⁷ Ibid.

⁶⁷⁸ See *Skilling v United States*, No. 08-1594, 561 US (2010).

⁶⁷⁹ See *United States v Ebberts*, 05-4059-CR (2006).

⁶⁸⁰ See *Securities and Exchange Commission v. Parmalat Finanziaria S.p.A.*, Case No. 03 CV 10266 (PKC) (S.D.N.Y.).

⁶⁸¹ See Geoffrey P Miller, 'Catastrophic Financial Failures: Enron and More' (2004) 89 *Cornell L. Rev* 423; Robert L Bradley, 'Enron: The Perils of Interventionism' *Library of Economics and Liberty*, 3 September 2012; William W Bratton, 'Enron and the Dark side of Shareholder Value' (2002) *Tulane Law Review* 1275-1281; Jonathan F Foster, 'Another View: Improving Corporate Governance' *The New York Times*, 11 June 2010.; John C Coffee, 'Understanding Enron: It's About the Gatekeepers, Stupid' (2002) Columbia Law & Economics Working Paper No. 207 < <http://ssrn.com/abstract=325240> > last accessed 20.11.2015.

Company Accounting Oversight Board, to: develop standards for the preparation of audit reports; the restriction of public accounting companies from providing any non-auditing services when auditing; provisions for the independence of audit committee members; executives being required to sign off on financial reports, and; relinquishment of certain executive bonuses in cases of financial restatements.

It is now well over a decade ago, since the Sarbane-Oxley Act has been in force, and although well intended, it did fail to prevent the subsequent scandal of the Lehman Brothers,⁶⁸² which in effect brought about the financial crisis of 2008, referred to as 'the worst financial crisis since the Great Depression'.⁶⁸³ However, positive reports are also evident from a case study of nearly 2,500 companies carried out by the 2007 Lord & Benoit Report.⁶⁸⁴ Some believe things could have been much worse had the accounting regulations been as lax as the financial regulations. It is believed a number of countries adopted similar rules following the US Sarbane-Oxley Act, including Canada, South Africa, France and Australia.

What is important is the need to replace the cyclical bursts of criminal proceedings as seen in the US and elsewhere, by continuous, low level pressure of private suits in order to keep deterrence on a day-by-day rule despite the failures of US laws shown by *Enron* and similar scandals. The design of substantive rules needs to be balanced in an appropriate basis for detection and prosecution. Auditors should be subject to adequate level of oversight, independent of the entity they audit, and the auditors themselves should possess a high and internationally acceptable standard.⁶⁸⁵

Following the Italian *Parmalat* scandal, the European Parliament passed a resolution on corporate governance, and supervision of financial services dated 12 February 2004, and the Commission adopted on 27 September 2004, a communication addressed to the Council, and the European Parliament.⁶⁸⁶ The communication points out that transparency, supervision and oversight have to be improved, especially as far as tax havens are concerned, and law enforcement has to be strengthened through increased cooperation amongst agencies and

⁶⁸² See Ashleigh Montgomery, 'The Dearth of Ethics and the Death of Lehman Brothers' *Seven Pillars Institute for Global Finance and Ethics* < <http://sevenpillarsinstitute.org/case-studies/the-dearth-of-ethics-and-the-death-of-lehman-brothers> > last accessed 20.05.2017.

⁶⁸³ See Henry M Paulson, *On the Brink: Inside the Race to Stop the Collapse of the Global Financial System* (Grand Central Publishing 2010); See also Andrew Ross Sorkin, *Too Big to Fail: Inside the Battle to Save Wall Street* (Penguin Group 2010); John Kay, *Obliquity: Why our goals are best achieved indirectly* (Penguin Group 2011).

⁶⁸⁴ See The Lord & Benoit Report, 'Bridging the Sarbane-Oxley Disclosure Gap; (2007) *Lord & Benoit, LLC*;; See also The Lord & Benoit Report, 'The Sarbane-Oxley Investment - A Section 404 Cost Study for Smaller Public Companies' (2008) *Lord & Benoit, LLC*.

⁶⁸⁵ See n 680, *Parmalat*.

⁶⁸⁶ Communication from the Commission to the Council and the European Parliament of 27 September 2004 on preventing and combating corporate and financial malpractice [COM(2004)611 final].

public prosecutors. The communication stresses the need for further regulation concerning auditors, corporate advisors, analysts and rating agencies, and money-laundering. (But private enforcement was not at issue in the communication). The *Parmalat* case has also influenced the Commission in the drafting of the proposal for a directive on statutory audits of annual accounts, and consolidated accounts⁶⁸⁷ by amending Council Directives 78/660/EEC and 83/349/EEC.

In the UK, the new Competition and Markets Authority (CMA) has come fully into force as from 1 April 2014. It has taken over some of the functions of the OFT, and some of the responsibilities of the Competition Commission (CC). The CMA is expected to work better for consumers, business, and the wider community, and it would be responsible (hopefully) for making sure that the markets are open, transparent and dynamic.⁶⁸⁸ The new streamlined body is expected to conduct market studies, probe possible anticompetitive behaviour and also investigate mergers that could restrict competition. The CMA's immediate agenda includes a full-scale investigation into the energy companies, something that has so far eluded that sector, and which has been a subject of great interest and discussion in the public arena. To make the on-line market more effective and to investigate the activities of 'payday lenders' are on their agenda as well. It is expected the CMA to be a stronger and more effective authority, with a better deal for the consumers. However, nearly two years since the CMA assuming duties, the NAO has found that while it has made significant progress in making the regime more coherent, its business awareness of competition law is low, and while it has improved the robustness of its enforcement casework, 'the system has so far failed to produce a substantial flow of enforcement decisions.'⁶⁸⁹ The NAO has found that the flow rate of cases are lower compared to other Member States and the fines also too low.⁶⁹⁰ The NAO report also shows that the Competition enforcement has taken only 9 per cent of the total workload of the CMA.⁶⁹¹

⁶⁸⁷ European Commission - Directive of the European Parliament and of the Council, amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, 2011. {SEC(2011) 1384}, {SEC(2011) 1385}.

⁶⁸⁸ See Alex Chisholm, 'Aspirations and expectations for the Competition and Markets Authority' Speech given by CMA chief executive Alex Chisholm to the Ashurst General Counsel Conference on 14 November 2013.

⁶⁸⁹ National Audit Office, 'The UK competition regime' 2016, HC 737 (Summary), para 21 at 10.

⁶⁹⁰ National Audit Office, 'The UK competition regime' 2016, HC 737 (Part Two), para 2.11 at 32; See Figure 13 at 33.

⁶⁹¹ National Audit Office, 'The UK competition regime' 2016, HC 737 (Part Three), Figure 18 at 43.

6.4.2 IOSCO Highlights Need for Transparency in the Market

The International Organization of Securities Commissions (IOSCO) established a task force addressed at coordinating a response to the financial frauds. Its proposals for improvement of the financial sector sound sensible,⁶⁹² and should have been adopted in other areas such as business and corporate sectors, but with a genuine intention of effective implementation. It would not be beneath the CMA to adopt these proposals, to be the effective regulator it intends to be.

Some of the topmost IOSCO objectives and principles of securities, extracted from its long list are as follows:

- Greater transparency and disclosure throughout markets
- Balance between unrestrained expansion, innovation and over regulation
- Appointment of independent directors – (non-IOSCO)
- Increased internal resources devoted to monitoring market development
- Identifying emerging risks
- Engaging with other regulators, both nationally and internationally for robust and coordinated framework for market stability, and
- Avoidance of conflict of interest.

Further, it states the aim of the objectives and principles should be to promote conditions to better incentivise market participants in managing, and price risk appropriately.

Accordingly, regulators should adopt clear and consistent regulatory processes and powers. They should have proper resources and should possess the capacity to perform their functions and exercise their powers. They should monitor, mitigate and manage systemic risk within its

⁶⁹² IOSCO, Methodology: For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation, FR/11, September 2011; See also IOSCO, 'Mitigating Systemic Risk: A Role for Securities Regulators' Discussion Paper OR01/11, February 2011; IOSCO Objectives and Principles of Securities Regulation, July 2010 < <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> > last accessed 20.01.2016; IOSCO Objectives and Principles of Securities Regulation, 2003 < <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> > last accessed 20.01.2016.

mandate. Importantly, regulators must be independent and accountable. Fairness must be adhered to at all times, and there should be no conflict of interest. Regulation must be reviewed regularly, so that inspection, investigation and surveillance powers are up to date. Regulators should promote transparency of trading, designed to detect and deter manipulation, and other unfair trading practices. Effective and efficient management of large exposures, default risk, and market disruption, would reduce costs significantly.⁶⁹³

The need for legal oversight, observance of compliance regulation, and sufficient incentives to promote effective corporate governance cannot be overemphasised in the face of the revelations of corporate misbehaviour, since the financial crisis of the 2007/2008, which is described as more devastating than the Great Depression. It is now accepted that the crisis was the unintended result of deregulation of the banking industry, first in the US, followed faithfully by UK and most other European nations, and some eastern nations as well. The stark reality of corporate irresponsibility, and individual greed have been exposed in no uncertain terms by the way deregulation has enabled systemic unstable financial practices leading to outright fraud and exploitation.⁶⁹⁴

It is apparent that the OFT has had to spend a considerable length of time in order to ascertain the relevant market in the OFT cases, sometimes with much opposition from the defendants, who were also leniency recipients.⁶⁹⁵ It is, therefore, necessary to have a transparent market structure for enforcement authorities to quickly spot the areas of concentration, so as to enable proactive intervention. Market structure can be defined as the organisational and other characteristics of a market. Sudden increase in activity in a given market could be a good signal for a watchful enforcement agency to intervene.

In order to prevent future crises, there is a need to rethink afresh, by putting in place transparent governance procedures in the market rather than focussing on profits, and profit alone goals. Steady progress is what competition needs, not fast moving grab as you go encouragement by rewards, and immunity from punishment offered by indulgent regulatory measures.

⁶⁹³ Ibid.

⁶⁹⁴ US, 'The Financial Crisis Inquiry Commission Report' Official Government Edition, 2011, stated "widespread failures in financial regulation and supervision ...", and "failures of corporate governance and risk management at many systematically important financial institutions ..." led to the crisis, at xviii.

⁶⁹⁵ See sec 5.15, Barclays (OFT Decision No. CA98/01/2011), sec 5.19, Briggs (OFT Decision CA98/04/2005) and sec 5.23, Walker (OFT Decision CA98/04/2005).

6.4.3 Conclusion

It is manifest from the OFT investigations that detection of cartels through Leniency is not the success it has been claimed by its proponents. It is also apparent that there are procedural problems that allow colluders to escape with low penalties or no penalties at all at the end of long and arduous investigations, particularly where immunity is granted. The appeal procedure before the CAT appears to be more of a second trial, with new witnesses being called and cross-examined, putting the OFT at a disadvantage, although, some such new evidence before the CAT has brought to light that leniency recipients have not revealed all at the OFT investigations. On the other hand, victims are prevented from accessing information due to confidentiality afforded to colluders under leniency agreements.

Both the OFT investigations and the CAT appeals are generally lengthy, with much detail of every event and evidence given, which led the CA to make the observation in *Football Kit*⁶⁹⁶ that it is sufficient to present the relevant facts succinctly. Another important comment from the CA was that no balanced argument could be made by the co-defendants as against any submissions made by the full leniency recipient to the OFT, since the OFT does not provide the reasons for granting full immunity to that applicant.

In addition to the cases being protracted, there are also far fewer cases than expected compared to the cost involved, which has been a concern for the BIS, resulting in the reforms to create the new CMA.⁶⁹⁷ The concern expressed by BIS is evidence that the OFT's enforcement record is weak. As a number of the economists have found from their laboratory experiments, there is no incentive for cartelists to self-report if there is no robust enforcement taking place.⁶⁹⁸ The protracted nature of the cases also may well discourage potential leniency applicants.

The redaction of considerable amounts of details from the public version of the case records of the OFT investigations makes it difficult to arrive at a fair judgement of the procedural

⁶⁹⁶ See sec 5.16.

⁶⁹⁷ See sec 6.2.3.

⁶⁹⁸ See Chapter 3, sec 3.2.2.

framework. Secrecy of the leniency documents, coupled with redactions from the case records of important details may only reveal half the story.

As revealed in the *Football kit*⁶⁹⁹ and *VAA*⁷⁰⁰ cases, there is a question about relying on the evidence of Leniency witnesses. In the former, both Umbro and Allsports did not reveal all information to the OFT as required, and even lied to the CAT, while in the latter case a large amount of evidence had been not disclosed to the OFT by the full immunity applicant VAA, thereby breaching the leniency agreements.

Some of the OFT cases, such as the *Construction Industry*⁷⁰¹ only came to light after the cartel has ended. Although it is useful as a warning to others, a great deal of resources had to be used merely to impose some insignificant fines (reduced on appeal by the CAT). The cost (resources) incurred in these cases seem to be huge compared to the meagre fines imposed. Such resources could have been better used in interventionary actions against live cartels, in order to prevent likely further harm by those cartels.

The OFT's calculation procedure has also been heavily criticised by the CAT in some of the cases, despite the CAT itself has not given any calculus for its own decisions on reducing the OFT imposed fines. In reality, the OFT penalties never reached the maximum 10 percent turnover allowed, but further reductions were granted for mitigating factors as per the five step Guidance, even accommodating compliance procedures being introduced by the defendant companies. The OFT penalties imposed are insufficient for effective deterrence of cartels. As the Deloitte report⁷⁰² points out, a more effective deterrence mechanism would be the threat of criminal prosecution. Streamlining and strengthening criminal sanctions is a far better enforcement method than a lukewarm fining procedure, and it would make way for prosecuting senior officers who have played a key role as seen in most of the OFT cases.

The important conclusion to be drawn from the pattern of leniency applications by these cases, studied in Chapter 6, is that undertakings do not rush out with leniency applications in order to confess and seek immunity. Of the 22 cases where leniency was applied (two other cases being applications for clearance), only one leniency applicant came forward willingly⁷⁰³ prior to the instigation of an investigation by the OFT. Two other applicants came forward because, one had already been found out by another legal entity,⁷⁰⁴ and the other was aware that they

⁶⁹⁹ See sec 5.16, *Replica Football Kit*.

⁷⁰⁰ See sec. 5.11, *Airline Fuel Surcharge*.

⁷⁰¹ See sec 5.23, *Construction Industry*.

⁷⁰² See n 657.

⁷⁰³ See sec 4.15, *Loan products*.

⁷⁰⁴ See sec. 4.9, *Stock check pad*.

would come under investigation in another jurisdiction.⁷⁰⁵ Another came forward just before notifying its intention to go into a merger.⁷⁰⁶ All the rest of the cases came to light through informers outside of the cartels or a few who were directly affected by those infringements. Thus applicants 'racing to obtain immunity'⁷⁰⁷ has not happened in the OFT cases.

The surprising outcome of the analysis of these cases is that, there were considerable amount of documentary evidence which the OFT was able to seize in all the cases which belies the claim that evidence is difficult to obtain in cartel cases. Hence, this outcome in effect destroys the very basis of the introduction of the Leniency Programme.

After the Italian *Parmalat*⁷⁰⁸ revelations, the Commission adopted a resolution which points out the importance of improving transparency, supervision and oversight. The UK's new CMA has also expressed its intention to make sure that the markets are open, transparent and dynamic.⁷⁰⁹ The IOSCO has also placed its top priority to be greater transparency and disclosure throughout markets. As long as market operations remain in a closed environment it will be a barrier for enforcement authorities to intervene and defuse problem areas early. It is, therefore, paramount that markets are open and transparent for effective detection and deterrence of anticompetitive behaviour rather than expecting infringers to come forward and confess on their own accord.

The next chapter examines the effect of leniency on private actions by victims of cartel activity by businesses, owing to confidentiality and non-disclosure afforded to leniency documents and business secrets.

⁷⁰⁵ See sec 4.11, *Airline fuel surcharge*.

⁷⁰⁶ See sec 5.25.

⁷⁰⁷ See sec 6.4.

⁷⁰⁸ See n 680.

⁷⁰⁹ See n 688, Alex Chisolm speech.

CHAPTER 7

How Leniency Jeopardises Enforcement of Victim Redress

7.1 Introduction

The purpose of this chapter is to examine another detrimental effect of granting leniency to offending parties where the enforcement of competition law is concerned. Much emphasis has been made by regulators of the importance of private actions as a parallel enforcement procedure in facilitating competition in the market.⁷¹⁰ After the important rulings in *Delimitis*⁷¹¹ and *Automec II*,⁷¹² the Commission adopted its Notice on cooperation with national courts, thereby employing the use of soft law as an approach for harmonisation.⁷¹³

Despite the emphasis on private actions being a deterrent and a compensatory mechanism in the enforcement of competition law, private actions remain the least used mode of enforcement in the UK, and the EU. One of the reasons, if not the main reason for victims' inability to make use of private enforcement is the barrier to access vital documents to prove their claims. In principle, even in a 'follow on' action the claimant has to prove that the harm caused to her was a direct result of the proven infringement.⁷¹⁴ Therefore, the burden of submitting relevant evidence in a damages claim rests with the victim. The privilege of nondisclosure afforded to infringers who have broken the law, but are granted leniency for

⁷¹⁰ Mario Monti, 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation' 17 Sept 2004, Speech at ABA 8th Annual conference, Fiesole, SPEECH/04/403; Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' 22 September 2005, New York, SPEECH/05/533; Neelie Kroes, 'Consumers at the heart of EU Competition Policy' 22 April 2008, Strasbourg, SPEECH/08/212; Neelie Kroes, 'Consumer welfare: more than a slogan' 21 October 2009, Brussels, SPEECH/09/486 < ec.europa.eu/competition/speeches/index_theme_35.html > accessed 01.01.2015.

⁷¹¹ See Case C-234/89 *Stergios Delimitis v Henninger Braeu AG* [1991] ECR I-935.

⁷¹² See Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223.

⁷¹³ Notice on the Cooperation between National Courts and the Commission in Applying Articles 81 and 82 of the Treaty, OJ 1993 C39/6.

⁷¹⁴ *Albion Water v Dwr Cymru* [2013] CAT 6; *2 travel v Cardiff Bus* [2012] CAT 1; *Devenish v Sanofi-Aventis and others* [2008] EWCA (Civ) 1086.

cooperation in the investigation against them, can be a stumbling block in obtaining the necessary evidence for a victim's claim. The cartel participants are thus protected from details of their wrong doing being given to anyone without their prior consent. Two recent cases discussed in this chapter together with the latest development by way of the new Commission Directive on Antitrust Damages⁷¹⁵ illustrate the complexity of the Leniency policy, and the difficulty it poses for victims' right in bringing successful private actions.

7.1.1 Individual Right for Damages

The right for damages actions by victims of competition law infringements is well established since the judgement in *Courage v Crehan*⁷¹⁶ where the Court of Justice held that:

'Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.'⁷¹⁷

The right of an individual for restitution for injury suffered is enshrined in the European Convention on Human Rights (ECHR) as an inalienable human right, and the Commission (although not yet a signatory to the ECHR) has emphasised that it respects and observes the rules contained within the ECHR.⁷¹⁸ In this regard, Article 47 of the Charter of Fundamental Rights of the European Union appears to have encompassed the rules governing the ECHR. Moreover, the Commission has made a recommendation for collective redress to enforce the rights granted to citizens and companies under EU law, notably consumer protection, competition, and other areas, to improve access to justice.⁷¹⁹

⁷¹⁵ **Commission Directive**, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance. OJ L 349, 5.12.2014.

⁷¹⁶ Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and others*, (2001) ECR I-6297.

⁷¹⁷ *Ibid*, para 27.

⁷¹⁸ CJEU has refused EU's accession to ECHR yet again in a ruling in December 2014, (Opinion 2/13); See CJEU Press Release No. 180/14, 18 December 2014; Michael Cross, 'EU court snubs human rights accession' *The Law Society Gazette*, 18 December 2014.

⁷¹⁹ Commission Press Release, 'Commission recommends Member States to have collective redress mechanisms in place to ensure access to justice' 11 June 2013 < http://ec.europa.eu/justice/newsroom/civil/news/130611_en.htm > accessed 07.08.2015; See also Commission FAQ, MEMO/13/530.

7.2 Modernisation Regulation 1/2003 and Private Enforcement

After the modernisation and decentralisation (EC) Regulation 1/2003 reform, it was expected that private actions would play a pivotal role in aiding the enforcement of Article 101 (and 102) by means of actions for damages before national courts.⁷²⁰ The Commission regards such private enforcement as a useful and necessary adjunct to public enforcement by the Commission and the NCAs.⁷²¹ It was expected private actions to be a means of enforcement complementary to public enforcement, thereby enhancing and maximising the number of overall competition law enforcement.⁷²² The Commission has stressed the importance of the role that the national courts should play in the enforcement of competition law by emphasising the advantage of private actions by victims in order to bring more 'claims' to the courts.⁷²³ The claims could include award of damages, legal costs and interim measures. Private competition law claims may arise in many contexts, as for example some claims could arise from franchise agreements, distribution agreements, partial function joint ventures or licensing agreements.⁷²⁴

Notwithstanding the often quoted *Courage*, and the emphasis on the part of the EU, private damages enforcement has remained almost non-existent in the EU, as opposed to the widely used private actions in the US. The study by Ashurst found astonishing diversity and total underdevelopment in damages actions in the EU.⁷²⁵ The study has revealed only around 60 judgements in damages cases in 25 Member States. Of these only 28 judgements resulted in

⁷²⁰ Recital 7 of Regulation 1/2003; White Paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404}, {SEC(2008) 405}, {SEC(2008) 406}; Case C-213/89 *R v Secretary of State, ex parte Factortame* [1990] ECR I-2433; Joined Cases C-6/90 & 9/90 *Francovich and others v Italy* [1991] ECR I-5357; Case C-128/92 *HJ Banks v British Coal Corporation* [1994] ECR I-1209.

⁷²¹ Commission (EC) Staff Working Paper SEC 2005 1732, para 15; Case 253/00 *Munoz v Frumar* [2002] ECR I-7289, opinion of AG Geelhoed.

⁷²² Case 26/62 *Van Gend en Loos* [1963] ECE 1; Stephen Weatherill, *Cases and Materials on EU Law*, (7th edn, OUP 2005), p 99.

⁷²³ Commission (EC) Notice on the handling of complaints by the Commission under Article 81 and 82 of the EC Treaty [2004] OJ C101/65.

⁷²⁴ Case 161/84 *Pronuptia* [1986] ECR 353; Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 382; Case COMP/37.730 *Re The Agreement between Deutsche Lufthansa AG and Austrian Airlines* OJ [2002] L242/25; [2003] 4 CMLR 252; Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055.

⁷²⁵ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' Comparative Report, Ashurst, 31 August 2004 < http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html > last accessed 21.02.2015.

award of damages. Among the reasons is the difficulty in accessing the evidence which would be mainly in the possession of the infringer, coupled with an obligation to present all evidence on filing a claim. Hence, there is a large risk for an individual victim getting involved in an action that could take years to resolve, and a great deal of expense in addition, with an outcome that may ultimately come to nothing.

At national level, there has been various reforms designed to facilitate private competition law enforcement in the Member States, such as the UK's EA 02, the 7th amendment of the German Law against Restraints of Competition (GWB),⁷²⁶ and new legislation in Bulgaria,⁷²⁷ the Czech Republic,⁷²⁸ Denmark,⁷²⁹ Hungary⁷³⁰ and Italy.⁷³¹ Nevertheless, there appear to be far too many obstacles on the way to successful private actions.

In *Arkin*, the High Court decided that the plaintiff who continued trading although he knew that he was losing his business, may take the form of contributory fault, and therefore the chain of causation was broken which excluded the defendant's liability for damages.⁷³² In *Enron Coal*, again the claimant failed as the Court of appeal upheld the CAT decision, stating that the claimant needs to adduce clear evidence of causation and loss to recover damages.⁷³³ This case illustrates that 'but for' (the infringement), the claimant has to prove that he would have been in a more favourable position. This could only happen if enforcement authorities make findings that the infringement concerned actually caused damages to specific companies. This is unlikely to happen in infringement decisions, where findings on specific effects are not generally required for the enforcement authority to make an infringement decision and, impose sanctions.⁷³⁴

In Sweden, the national court struggled to establish causation and quantifying harm caused by an exclusionary breach.⁷³⁵ In a claim against British Airways, the UK Court of Appeal

⁷²⁶ Helmut Bergman and Frank Rohling, 'The new German antitrust Act gives way to damages actions (Gesetz gegen Wettbewerbsbeschränkungen in der Fassung des Beschlusses des Deutschen Bundestages)' 16 June 2005, e-Competitions, n 12706.

⁷²⁷ Dessislava Fessenko, 'The new Bulgarian Act on the Protection of Competition' 28 November, 2008, e-Competitions, n 23076.

⁷²⁸ Robert Pelikan and Jan Poevratil, 'The Czech NCA circulates a draft amendment to the Act on the Protection of Competition aimed at a harmonisation with substantive EC competition law, inclusion of specific procedural rules and launch of private enforcement' May 2008, e-Competitions, n 19852.

⁷²⁹ Jacob Borum, 'The Danish Parliament approves an amendment enabling antitrust class action' 22 February 2007, e-Competitions, n 13745.

⁷³⁰ Bálint Bassola, 'Modernisation of the Hungarian Competition Act' 1 November 2005, e-Competitions, n 406.

⁷³¹ Cristina Poncibo, 'The Italian Law providing for a group action has entered into force permitting collective enforcement of competition law in Italy ("Azione di classe")' 9 July 2009, e-Competitions, n 26730.

⁷³² *Arkin v Bochard Lines* [2003] EWHC 687 (Comm).

⁷³³ *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2009] CAT 36; [2011] EWCA Civ 2; The claimant sought to rely on s 58 CA 98.

⁷³⁴ See Chapter 5 (OFT decisions).

⁷³⁵ Jacob Lundstrom, 'The Stockholm District Court awards damages in private antitrust case for abuse of dominant position (Europe Investor Direct a.o./VPC)' 20 November 2008, e-Competitions, n 22902.

rejected the claim of a plaintiff's 'representative action' on behalf of other un-named victims as well, invoking Civil Procedure Rule 19.6.⁷³⁶ This is in contrast to some other EU jurisdictions, such as the Netherlands where the 2005 Act on Collective Settlement of Mass Claims⁷³⁷ appears to allow US style actions in cartel damages claims.⁷³⁸

The CAT rejected cartel damages claims by *Deutsche Bahn* and other claimants against *Morgan Crucible* on the ground that the actions were out of time.⁷³⁹ Under the CAT's Rules, it was deemed that a claim for damages must be brought within two years 'from the end of the period specified in s 47A (8) of CA 98.' However, noting that its decision in the case contradicted one of its earlier judgements, the CAT granted *Deutsche Bahn* leave to appeal to the Court of Appeal. The Court of Appeal reversed the CAT's judgement, disagreeing with the CAT's narrow interpretation, thereby permitting the limitation period to be extended pending appeals against Commission Decisions before the European Courts or even where the Decision could still be appealed. Fortunately for the victims, the time limitation has now been rectified under CRA 15, to bring it in line with that of the High Court, which is 6 years.

In a more positive approach, in *Bord na Mona*,⁷⁴⁰ the High Court found that an injured party may bring a 'hybrid' claim (neither a pure follow-on claim nor a pure stand-alone claim), provided that the claim does not run contrary to the Commission decision.

In the meantime, the German Supreme Court allowed a de facto class action, confirming the permissibility of 'bundled' antitrust damages actions, similar to opt-in actions.⁷⁴¹ Another development is in respect of disclosure, where in the French *Ma Liste* case, the Commercial Court in Paris ordered the French competition authority, the Autorité de la Concurrence to disclose documents relating to the settlement of an antitrust investigation in the context of a private damages action.⁷⁴² This decision is important because normally it is more difficult for

⁷³⁶ *Emerald supplies Ltd & Another v British Airways Plc* [2009] EWHC 741 (Ch); [2010] EWCA Civ 1284; [2010] All ER (D) 200 (Nov). The Commission however, has since found against British Airways and other air freight carriers, issuing an infringement decision for fixing prices of air freight services, (Commission decision of 9 November 2010, Commission press release IP/10/1487).

⁷³⁷ 'Wet collectieve afwikkeling massaschade' appears to allow US style actions in cartel damages claims.

⁷³⁸ Amsterdam Court of Appeals, *Shell mass claims settlement* of 29 May 2009 and Non-US *Claims against Convergium Holding AG and Zurich Financial Services Ltd.*, 12 November 2010 < www.royaldutchshellsettlement.com > last accessed 13.05.2015; *Shell Petroleum N. V./ Dexia Bank Nederland N. v Gereschtshof Amsterdam [HoF]* [Amsterdam Court of Appeal], Amsterdam, 29 May 2009, NJ 506 (Neth.).

⁷³⁹ *Deutsche Bahn AG v Morgan Justice FlauxCrucible Company Plc* [2011] CAT 16.

⁷⁴⁰ *Bord na Mona Horticulture Ltd v BPI and others* [2012] EWHC 3346 (Comm); Claim No 2011 Folio 1442. Justice Flaux denied BPI permission to appeal the judgement.

⁷⁴¹ *Cartel Damage Claims (CDC) v Dyckerhoff AG*, 7 April 2009.

⁷⁴² Tribunal de Commerce de Paris, 15th Chamber, *SAS Ma Liste de Courses v Société HighCo 3.0. SA*, decision of 24 August 2011.

a victim to prove harm (or impossible) when an investigation by an NCA settles an investigation, and therefore no formal finding of an infringement takes place.

In the UK, s 60 of CA 98 requires domestic law to be interpreted and applied consistently with EU law, and includes a specific reference to 'the civil liability of an undertaking for harm caused by its infringement of Community law.'⁷⁴³ Initially, CA 98 did not make specific references to third party actions in the civil courts. However, in the debate in the House of Lords on the CA 98 Bill, Lord Simon confirmed that 'It is true that third parties have rights to seek damages in the courts as a result of actions here.'⁷⁴⁴ Nevertheless, s 58 of CA 98 makes only oblique references to third party actions. The EA 02 introduced a new s 58A into CA 98, clarifying the link between public enforcement and private rights. It is now expressly recognised that there may be proceedings before the courts in which damages may be claimed. The original s 58 applies to all claims, it may be that s 58A will do so as well, if not s 58A will do little more than explaining the effect of s 58.⁷⁴⁵

Any court in the UK is bound by decisions of the OFT or the CAT to the effect that relevant provisions of the CA 98 have been infringed. Other than actions for damages or monetary relief there is no reference to claims for other forms of relief under those provisions. However, CRA 15 has empowered the CAT to grant injunctions, create a fast-track procedure for straight-forward follow on damages, and has brought the CAT in par with the High court in dealing with damages claims. Importantly, CRA 15 has widened the CAT's jurisdiction by enabling it to hear both 'follow on' and 'stand-alone' damages actions, which can take the form of either 'opt-in' or 'opt-out' Collective proceedings,⁷⁴⁶ subject to certain conditions. But under the new CRA 15 reforms, no exemplary damages will be awarded to victims, as has happened in the *Cardiff Bus* ⁷⁴⁷case, where exemplary damages were awarded for the first time by the CAT.

⁷⁴³ Section 60 (6) (b), CA 98.

⁷⁴⁴ Lord Simon, HL Deb, 17 November 1997, Col. 456.

⁷⁴⁵ Sandra Marco Colino, *Competition Law of the EU and UK* (Oxford University Press, 2011), pp137-138.

⁷⁴⁶ CRA 2015, Schedule 8, ('47B').

⁷⁴⁷ See *2 Travel Group plc v Cardiff City Transport Services Ltd*, [2012] CAT 19.

7.2.1 *Pfleiderer* Decision

Since the CJEU decision in *Pfleiderer*⁷⁴⁸ much analysis by lawyers and commentators alike have taken place regarding leniency documents, due to the mixed message it sent across the Member States.⁷⁴⁹ The decision concerned the confidentiality clauses in leniency programmes, and the right of victims to have access to leniency documents to enable them to institute private actions.⁷⁵⁰ The CJEU ruled in the case, that EU law does not prohibit access to leniency documents by third parties seeking damages, and that such access should be a matter for the national court of each Member State to decide on a case by case basis, by weighing the arguments in favour and against disclosure of documents submitted under leniency programmes.

The case originated in Germany with an application to the Bundeskartellamt (Federal Cartel Office) by the victim of a cartel infringement, requesting for the documents of the investigation in which the infringer was granted leniency. *Pfleiderer*, a customer, was seeking full access to the file from Bundeskartellamt, in relation to its 2008 cartel decision imposing a fine of 62 million euros on three European manufacturers of décor paper, to enable him to file an action for damages. The Bundeskartellamt refused access to the relevant documents, and seized them. *Pfleiderer* sued the Bundeskartellamt and on 3 February 2009, the Bonn Amtsgericht (the District Court of Bonn) ordered the authority to grant access of the leniency documents to *Pfleiderer*, not including confidential business information, legal documents or correspondence through the ECN. The Court ruled that *Pfleiderer* was an aggrieved party according to German law, and had a legitimate interest in accessing the documents in order to recover damages in a private action. The court then stayed the decision pending a reference

⁷⁴⁸ Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161.

⁷⁴⁹ See Bruce Wardhaugh, 'Cartel Leniency and Effective Compensation in Europe: The Aftermath of *Pfleiderer*' (2013) 19(3) *Web Journal of Current Legal Issues* 1-32; Niels Christian Ersbøl and Luc Gyselen 'Discovery of Leniency Submissions in Europe: The *Pfleiderer* Judgment: Dawn of a New Era or Nothing New Under the Sun?' (2011) *Arnold & Porter LLP*, 1-6.

⁷⁵⁰ Up until this decision the EC's position has been quite clear. While encouraging Member States to facilitate private actions, it has consistently asserted the need to protect from discovery not only corporate statements but also other leniency material including contemporaneous documents. In its 2004 Notice on cooperation with national courts in the EU, (OJ C101/54 27/04/2004), the Commission states that, 'it will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.' (para 26). Such information covers both oral statements and pre-existing documents submitted by the leniency applicant. In its 2006 Leniency Notice, the EC does not deal with disclosure of leniency material directly.

made under Article 267 TFEU (ex 234 EC), by the Amtsgericht Bonn in Germany to the CJEU, to ascertain whether such access to leniency documents would be compatible with EU law.⁷⁵¹

The CJEU found that ‘neither the provisions of the EC Treaty on competition nor Regulation 1/2003, lay down common rules on leniency or common rules on the right of access to documents relating to a leniency procedure.’⁷⁵² The CJEU further noted that the Commission Notices, and the Model Leniency Programmes within the ECN, are not binding on Member States.⁷⁵³ Thus, in the absence of any binding provision under EU law, it is for the Member States to establish, and apply, national rules on the right of access by persons adversely affected by a cartel, to documents relating to leniency procedures. However, the CJEU also ruled that in establishing such national rules, the Member States ‘may not render the implementation of European Union law ‘impossible or excessively difficult’⁷⁵⁴ or “jeopardise the effective application” of Articles 101 and 102 TFEU.’⁷⁵⁵

The CJEU’s decision was in contrast to the opinion of Advocate General Mazak,⁷⁵⁶ who in December 2010 issued his opinion advising against giving claimants full access to documents supplied under national leniency programmes. He was of the opinion that it could also lead to non-cooperation between leniency applicants and NCAs. A-G Mazak proposed that a distinction must be made between pre-existing documents, and incriminating statements made by firms after entering into a leniency agreement. He opined that pre-existing documents should be disclosed because denying access to those would be in conflict with the fundamental right to a fair trial and effective remedy, but any incriminating statements made under a leniency agreement should be protected from disclosure.

Competition authorities from seven European national governments also objected to the CJEU decision, stressing the importance of leniency programmes in investigating cartels and, that

⁷⁵¹ Under this procedure, national courts may request the CJEU to issue an opinion on the construction of EU law in national court proceedings. Rulings however do not cover the merits of the case.

⁷⁵² See n 748, [20].

⁷⁵³ Ibid, [21] and [22].

⁷⁵⁴ Ibid, [30].

⁷⁵⁵ Ibid, [24]; See also Case C-154/08 *Commission v Spain* [2009] ECR I-187, [121].

⁷⁵⁶ Opinion of Advocate General Mazak delivered on 16 December 2010 in Case C-360/09 *Pfleiderer AG v Bundeskartellamt*.

disclosure of leniency documents could deter companies from participating in those programmes.⁷⁵⁷

In the *Pfleiderer* judgement, in June 2011, while recognising the fact that allowing access to the documents could compromise leniency programmes, the CJEU also had to balance that with the well-established right of individuals to claim damages for competition law infringements. The Court took into consideration the judgements in *Courage*⁷⁵⁸ and *Manfredi*⁷⁵⁹ in arriving at its decision.⁷⁶⁰

The responsibility of deciding the feasibility of allowing access to leniency documents was therefore thrown back at national courts, so that the NCAs must consider such applications on a case by case basis, taking into account all the relevant facts in each case.

The situation is different where the leniency procedure has taken place before the European Commission, as jurisdiction over litigation between a company and the Commission is reserved exclusively to the EU courts in Luxembourg. An aggrieved company is therefore precluded from applying to a national court to obtain a judicial order compelling the Commission to transmit the file of a leniency applicant, nor can it apply to that court for an order against the Commission, under current EU law. However, while no court has jurisdiction over the Commission to issue an injunctive order against it, the Commission nonetheless must comply with EU law. In this respect, the *Pfleiderer* decision is not limited to NCAs and national courts alone, but logically, the ruling encompasses the Commission as well. According to the CJEU's *Pfleiderer* decision, EU competition rules do not preclude, 'a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.'⁷⁶¹ On the one hand, the Commission cannot be

⁷⁵⁷ See Pierre Kirch, Jeremy Evans and Michelle Littleken, 'The future of leniency: Plaintiffs in pursuit' (2011) 14(8) *Global Competition Review* < www.globalcompetitionreview.com > last accessed 11.03.2015; cf. Angus MacCulloch and Bruce Wardhaugh, 'The Baby and the Bathwater - The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy' (2012) 1-26 < <http://ssrn.com/abstract=2089369> > last accessed 04.04.2015.

⁷⁵⁸ Case C-453/99 *Courage v Crehen* [2001] ECR I-6297, [24] [26].

⁷⁵⁹ Joined Cases C-295/04 to 298/04 *Manfredi and others* [2006] ECR I-6619, [59] [61].

⁷⁶⁰ See n 748, *Pfleiderer*, [28] [29].

⁷⁶¹ *Ibid*, [32].

ordered by a court to produce documents to an aggrieved third party, but on the other hand, it must comply with EU law.

National law governs in the absence of binding EU regulation on a subject, but the Member States must ensure that national laws do not jeopardise the effective application of the EU competition rules.⁷⁶² The CJEU acknowledged the important role played by leniency programmes in ensuring effective enforcement of EU competition law, and the potential for disclosure of materials provided under such programmes to undermine their effectiveness. Nevertheless, the CJEU found that this concern must be balanced against the need to ensure that individuals harmed by anticompetitive behaviour can obtain effective redress through national legal systems, which could also make a significant contribution to EU competition law enforcement.

The problem for Leniency Programmes arising from this decision is that it could discourage applicants coming forward to self-report, the principal attraction of being the first to do so is enabling them to receive complete protection from public liability. The fear is that this decision may create a doubt in the minds of those who wish to reveal their cartel involvement, because any evidence they provide through leniency applications could later be used against them by private damages claims. The CJEU has clearly increased the tension between leniency and private enforcement by the decision in *Pfleiderer*.

This tension was increased by the European Commission's determination to facilitate private actions with the publication of a Green Paper, a White Paper, a consultation on Collective Redress, and also a consultation on Quantifying Harm.⁷⁶³ The argument arising from the *Pfleiderer* decision is that while it makes sense to allow access to leniency documents to an injured party if she is entitled to damages under the law, it also casts doubt on infringing firms coming forward with leniency applications if they fear that their applications might later be used against them in private actions. Cauffman raised this issue, that an increasing number of damages actions may undermine leniency programmes, even though leniency and damages

⁷⁶² Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C101/2004.

⁷⁶³ Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}, Brussels 19 December 2005; COM (2005) 0672 final; White Paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {S 406} Brussels, 02 April 2008; COM (2008) 0165 final; Commission staff working document public consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final, Brussels, 4 February 2011; Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty, Public Consultation (From 17.06.2011 to 30.09.2011); Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the functioning of the European Union, C(2013) 3440, 11 June 2013.

actions, at least to a certain extent, serve the same purpose of increasing compliance with competition rules.⁷⁶⁴

The CJEU's ruling raises as many questions as it answers because it fails to give specific guidance on what factors the national courts should take into account. One such question had been whether national law could treat NCA decisions as binding proof of an infringement. This position has now been clarified by the subsequent Commission Directive affirmatively.⁷⁶⁵

Since the *Pfleiderer* judgement, a resolution of the Heads of the European Competition Authorities in May 2012, stressed the importance of the protection of leniency material in the context of civil damages actions.⁷⁶⁶ Subsequently, the Commission proposed in June 2013, a New Directive on Antitrust Damages Actions in the EU, which includes a range of safeguards aimed at protecting sensitive cartel evidence from disclosure to cartel victims, which means leniency corporate statements and settlement submissions shall never be disclosed.⁷⁶⁷ To promote consistent application of the EU competition rules, and to increase legal certainty, the Directive extends to final infringement decisions by NCAs or a national review court.⁷⁶⁸ The Directive which came into force in 2014, after due procedure, appears to have turned back on the *Pfleiderer* judgement, quashing any hope of victims accessing leniency documents.

7.2.1.1 National Grid

Following the ruling in *Pfleiderer*, the UK High Court had to consider a similar issue in *National Grid*,⁷⁶⁹ involving a follow-on damages action brought by National Grid against a number of defendants (including ABB, Alstom, Areva and Siemens). The action arose following a Commission investigation and decision relating to a cartel in the Gas Insulated Switchgear (GIS) sector.⁷⁷⁰ Alleging loss due to inflated prices by the cartel, National Grid sought disclosure from ABB and Siemens for: a) the confidential version of the Commission's

⁷⁶⁴ See Caroline Cauffman, The Interaction of Leniency Programmes and Actions for Damages (2011) 7(2) *The Competition Law Review* 181-220.

⁷⁶⁵ Under the new Directive on damages actions adopted by European Parliament on 17 June 2013, NCA decisions are deemed binding proof of an infringement.

⁷⁶⁶ Resolution of the Meeting of the Heads of the European Competition Authorities of 23 May 2012, Protection of leniency material in the context of civil damages actions.

<http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf> last accessed 27.11.2015.

⁷⁶⁷ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, Strasbourg, 11.6.2013.

⁷⁶⁸ Art 16 of Regulation 1/2003; See Case C-199/11 *European Community v Otis and others* [2012] ECR I-0000.

⁷⁶⁹ *National Grid Electricity Transmission Plc v ABB Ltd and others* [2012] EWHC 869 (Ch).

⁷⁷⁰ Case COMP/F/38.899 – *Gas Insulated Switchgear*; See also Julia Tew, 'Siemens AG and others v Commission (Gas Insulated Switchgear): The Difficulties Faced by Appellants Seeking to Challenge Leniency Evidence' *Journal of European Competition Law & Practice*, (2014) 5(5) 273–275.

decision, b) responses to the Commission's Statement of Objections and, c) responses to the Commission's requests for information in relation to the cartel.

The part of the National Grid's application for disclosure was adjourned by the court in order to seek observations from the Commission as to whether it was an issue to be determined by the UK court, and if so, what factors should be taken into account by a national court. Written observations on these issues were sent by the Commission to the High Court in November 2011, and published subsequently. In summary, the Commission when exercising its discretion (and the percentage of weight that should be given to those factors), argued that disclosure of leniency documents should only be granted where the documents are relevant to establish the claimant's damages claim, and that the relevant information cannot be obtained from an alternative source. Further, the whistleblower evidence, in particular the 'oral statement' should be the source of last resort.

The High Court, in its judgement relating to the National Grid's application, given in April 2012, approached the balancing exercise required by the decision in *Pfleiderer* by considering the factors argued to be relevant at the hearing, and the factors raised by the Commission in its written submission. Roth J dealt with four factors in the main: First, the court did not accept that the defendants had a 'legitimate expectation' that their leniency statements would be protected from disclosure, because the Leniency Notices issued by the Commission clearly stated that leniency status cannot protect a party from any civil law consequences of antitrust infringements. Second, the court accepted that it was relevant to consider whether 'disclosure would increase the leniency applicants' exposure to liability compared to the other parties that did not seek leniency. However, the court held that this was not so, based on the facts in *National Grid*. Third, the court considered the possible deterrent effect of a disclosure order on potential leniency applicants in relation to cartels that could be uncovered. But the court took the view that given the scale of fines imposed by the Commission, participants in serious cartels would still be motivated to apply for leniency. Fourth, and the final factor was proportionality. The court accepted that proportionality was a relevant factor in determining whether or not to order disclosure, by identifying the availability of information from other sources.

The court held that National Grid did not have other reasonable means of obtaining the information needed to make its case. In the present case therefore, Roth J ordered disclosure of only a limited number of redacted passages from the confidential version of the Commission's decision. These included certain passages from responses to Commission's information requests explaining some of the existing documents, and the operation of the

cartel. All other documents sought for disclosure by the claimant were not allowed. The court determined that some disclosure of the leniency documents should be provided but that did not follow that all requested documents should be disclosed.⁷⁷¹

This decision is in contrast to the decision of the German court in *Pfleiderer* where, on referral back from the CJEU, the German court ruled against the disclosure of leniency documents requested by the victim.

The ruling in the *National Grid* may indicate a more claimant friendly attitude by the UK courts which has been lacking in the enforcement of Competition law in the EU. It also raises the possibility of claimants considering a pattern of 'forum shopping' based on the most advantageous jurisdiction to institute their private damages claims.

The Commission's Director-General for Competition, Alexander Italianer, has said that only 25 per cent of the antitrust infringements found by the Commission have been followed by civil claims in the past eight years by Member States, and that most of them were brought in the UK, Germany, and the Netherlands where procedures are perceived to be more favourable.⁷⁷² He reiterated that the Commission's aims were; 1) to remove existing barriers to effective redress for victims of antitrust infringements and, 2) to regulate the interaction between public and private enforcement of EU antitrust rules, in particular to protect the effectiveness of EU and national leniency programmes.

Neelie Kroes has emphasised that the obligation to compensate the victims of antitrust infringement could not have a chilling effect on the leniency programmes of the European competition authorities.⁷⁷³

⁷⁷¹ *National Grid*, para 59.

⁷⁷² Alexander Italianer, 'Competition Law within a framework of rights and the Commission's proposal for a Directive on antitrust damage actions' Speech at the 12th Annual conference of the AECLJ, Luxembourg, 14 June 2013 < http://ec.europa.eu/competition/speeches/text/sp2013_06_en.pdf > last accessed 21.11.2015.

⁷⁷³ Neelie Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe', Dinner speech at the Harvard Club, 22 September 2005, New York. European Commission – SPEECH/05/533 22/09/2005; See Neelie Kroes, 'Damages Actions for Breaches of EU Competition Rules: Realities and Potentials', SPEECH/05/613 17/10/2005.

7.2.1.2 The Commission's New Directive on Damages Actions and Leniency

The EU Draft Directive published in June 2013 proposed the rules to be adopted by Member States in damages claims under EU antitrust law.⁷⁷⁴ The Directive was passed by the European Parliament in April 2014, and subsequently adopted by the Council in November 2014.⁷⁷⁵ The Member States will have to incorporate the Directive into their legal systems within two years.⁷⁷⁶

The new Directive sets out clear limits on the types of documents that claimants can have access to. What may not be disclosed specifically are; a) **corporate leniency statements** and, b) **settlement submissions**. Thus, the new Directive addresses the issue of access to leniency papers by claimants in damages actions by stating that Leniency statements, and other submissions prepared by a company during the competition law procedure admitting guilt, **should not be used** in civil actions against the company that made them. Other documents such as responses to information requests, and Statement of Objections can be relied upon once the proceedings by the competition authorities are closed.

Aside from leniency, one notable measure in the Directive is the rule that an infringement finding by an NCA decision constitutes irrebuttable proof of that infringement, which all Member States will have to adopt. It fulfils the requirement of illegality, a prerequisite for liability, thus enabling subsequent claims for civil damages by victims.⁷⁷⁷

⁷⁷⁴ Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions; See Press Release IP/14/455 and MEMO/14/310; The Commission's proposal for a Directive on Antitrust Damages Actions < <http://ec.europa.eu/competition/antitrust/actiondamages/documents.html> > accessed 20.06.2015; See Commission Press release IP/13/525 and MEMO/13/531.

⁷⁷⁵ **Commission Directive**, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance. OJ L 349, 5.12.2014.

⁷⁷⁶ See Commission Press Release IP/14/1580.

⁷⁷⁷ See Emmauela N Truli, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules: The Binding Effect of Decisions Adopted by Competition Authorities' (2009) 5 *European Competition Journal* 795; See also Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd*, [2000] ECR I-11369, [52].

Andreas Schwab, the German MEP who guided the directive through parliament, says a particular improvement is the introduction of voluntary compensation payments to be considered as a mitigating factor when competition authorities establish the fine.⁷⁷⁸ EU Competition Commissioner Joaquín Almunia welcomed the Parliament's decision, and says it will help the right to compensation a reality by removing practical obstacles that victims currently face. However, the Commission is of the view that due to widely diverging national rules across Europe, chances of victims to obtain compensation greatly depend on which Member State they happen to live in. Meanwhile, enforcers will be pleased to see leniency regimes strengthened through better protection of documents.

The Directive is expected to benefit plaintiffs because of a general presumption of harm, and the presumption that both direct and indirect purchasers suffer harm from a cartel. But presumption of harm concerns Assimakis Komninos. He says it is problematic in relation to cartels by object in which no anticompetitive effect is proven, 'I would not have a problem with this provision if it were applicable only in a cartel that has been implemented and produced effects.'⁷⁷⁹ Bernd Meyring of Linklaters believes it is a finely balanced compromise between different positions, adding that, 'Achieving this despite strong lobbying by plaintiffs, defendants, and regulators in different directions is a good result', but he opines, '... the last minute amendment which provides for beneficial treatment of small and medium undertakings compared to other defendants when it comes to their liability, does not sit well with general competition and civil law principles, nor is it in line with equal treatment.'⁷⁸⁰ Others fear it will accelerate the trend of competition litigation, and move ever closer to the parallel administrative, and civil enforcement seen in the US.⁷⁸¹

While the Directive aims to introduce minimum procedural standards across EU, some jurisdictions such as the UK, Germany and the Netherlands will remain more attractive than others for private damages. In particular, UK is likely to become increasingly claimant friendly with the proposed introduction of a US-style 'opt-out' system for Collective actions,⁷⁸² a

⁷⁷⁸ Henry Vane, 'Parliament passes antitrust damages proposal' *Global Competition Review*, Europe, Daily online news, 17 April 2014.

⁷⁷⁹ Ibid.

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid.

⁷⁸² BIS, 'New help for consumers and businesses to take action against price fixing' Gov.uk Press release, 29 January 2013; See also Government consultation response 'Private actions in competition law', Ref: BIS/13/501 < <http://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> > last accessed 21.11.15. (BIS has been merged with the Department of Energy and Climate Change to form the new Department for Business, Energy and Industrial Strategy (BEIS) as from July 2016.

proposal rejected by the EU. However, Peyer argues that, '... the Damages Directive does not provide enough incentives to encourage more claims.'⁷⁸³

The UK's CAT is preparing for the probable new regime set out under CRA 15, and in March 2014 published draft procedural rules for Collective proceedings claims. Peter Roth, president of the CAT, has said prompt publication of the full text of infringement decisions would be a great help to parties seeking follow-on damages.⁷⁸⁴

How the new Directive may be reconciled with the decision in *Pfleiderer* will remain in the hands of the judges of the particular legal system in each Member State. The Directive on Antitrust Damages is a binding document on the Member states, but they are bound to take account of CJEU decisions also. After the *Pfleiderer* decision, Almunia raised concerns, calling for legislation to protect the leniency programme, but also ensuring the right to private damages actions.⁷⁸⁵ In the meantime, the EU General Court overturned a Commission decision denying an application by EnBW, a German energy distributor access to leniency documents (which related, as did *National Grid*, to the GIS cartel).⁷⁸⁶

The Commission is obliged under Article 30 of Regulation 1/2003 to publish its decisions in competition infringement cases. Article 30 orders the Commission to publish the names of the parties and the main content of the decision, including any penalties imposed. It shall however, have regard to the legitimate interest of undertakings in the protection of their business secrets. In addition to this mandatory publication in the Official Journal, the Commission voluntarily publishes a non-confidential version of the decision itself.⁷⁸⁷

In principle, EU citizens and those residing in the EU can also have access to the documents held by the Commission under Article 15 (3) TFEU (ex 255 EC), and the Transparency Regulation (1049/2001). Although there are exceptions to the rule under Article 4, an overriding public interest will ensure the disclosure of a document. The applicability of

⁷⁸³ Sebastian Peyer, 'Compensation and the Damages Directive' 2015, *UEA Law School* 1-30, p 3 < <http://ssrn.com/abstract=2654287> > last accessed 15.12.2015.

⁷⁸⁴ Collective Proceedings and Collective Settlements in the Competition Appeal Tribunal: Draft Tribunal Rules, 10 March 2014.

⁷⁸⁵ Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, 'Public enforcement and private damages actions in antitrust' Speech in the European Parliament, ECON Committee, 22 September 2011, Brussels; European Commission – SPEECH/11/598 22/09/2011.

⁷⁸⁶ See Case T-344/08, *EnBW Energie Baden-Württemberg AG v Commission* [2012] ECR 242; Joined Cases Cases C-239/11 P, C-489/11 P, and C-498/11 P. *Siemens AG and others v Commission (Gas Insulated Switchgear)* [2013] ECR 866.

⁷⁸⁷ Antonio Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission' (2010) 1(6) *Journal of European Competition Law & Practice* 453-477.

Regulation 1049/2001 in Competition Law has been confirmed by the General Court in *Technische Glaswerke Ilmenau*.⁷⁸⁸ However, the Commission in its Leniency Notice reiterates its concern over disclosure of documents and statements received under the Leniency Notice which could undermine certain public and private interests, such as the protection of the purpose of inspections and investigations, as stipulated in Article 4 of Regulation 1049/2001. According to the Commission, potential applicants would be dissuaded from cooperating with Commission investigations if they fear they are likely to be exposed to private civil actions owing to disclosure of their leniency documents.

By the new Directive on antitrust damages, the Commission attempts to draw the line in this long running debate, on whether allowing the disclosure of leniency documents is compatible with public enforcement through leniency programmes. The Directive appears to lean heavily on public enforcement through leniency, and thereby sending a conflicting message to that advocated by the CJEU in *Pfleiderer* ruling, and confirmed consequently by the ruling in *Donau Chemie*⁷⁸⁹ in June 2013. In the latter case however, a clarification was made, in that a national law enforcing a blanket refusal is liable to prevent damages actions being brought. The CJEU concluded that the principle of effectiveness under EU law does preclude a national rule such as the Austrian one concerned in that case.⁷⁹⁰ This is in keeping with the EU law which is intended to give rights to individuals,⁷⁹¹ as emphasised in *Courage*⁷⁹² and *Manfredi*,⁷⁹³ and to give full effect, and protect individuals by national courts.

The CJEU has recognised consistently in a number of judgements the procedural, remedial, and institutional autonomy of the Member States to identify the courts, the procedures and the remedies that are necessary for the exercise of the EU law rights at national level.⁷⁹⁴ The

⁷⁸⁸ See Case T-237/02, *Technische Glaswerke Ilmenau GmbH v Commission of the European Inspections and Investigations Communities* (2006), ECR II-5131.

⁷⁸⁹ Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* [2013] ECR 366. [34].

⁷⁹⁰ *Ibid*, para 35.

⁷⁹¹ Assimakis P Komninos, *EC Private Antitrust Enforcement: Decentralised application of EC Competition Law by National Courts* (Hart Publishing 2008), p 203.

⁷⁹² See n 758.

⁷⁹³ See n 759.

⁷⁹⁴ Joined Cases C-6/90 and C-9/90, *Francovich and others v Italy* [1991] ECR 1-5357, [31]; Case C-213/89, *Factortame and others* [1990] ECR 1-2433, [19]; Case 106/77, *Simmenthal* [1978] ECR 629, [16].

CJEU has also imposed limits and safeguards upon that autonomy, by its principles of 'equality and effectiveness'.

In the UK, the former OFT has stressed that confidentiality in the leniency submissions are safeguarded from disclosure to protect its leniency programme. However, the OFT/CMA has to comply with any order by a court or the CAT, to disclose information notwithstanding the confidentiality of such documents.⁷⁹⁵ In *Argos and Littlewoods*,⁷⁹⁶ the CAT ordered the disclosure of certain documents Hasbro submitted to the OFT (in the hope of obtaining leniency), to the other parties in the appeal case. In that case, the CAT cited an earlier order the CAT made on 'Confidentiality' in respect of disclosure of business sensitive material in *Aberdeen Journals Ltd*.⁷⁹⁷ The CAT has also ordered disclosure relating to the calculation of turnover in *Umbro*,⁷⁹⁸ The CAT stated in *Argos and Littlewoods* that 'the grant of leniency under the OFT's guidelines does not provide an absolute guarantee of indefinite confidentiality.'⁷⁹⁹ In view of the CJEU's *Pfleiderer* decision, NCAs may be able to view disclosure on a case by case basis, notwithstanding that the Commission has strengthened its attempt at safeguarding leniency documents by its latest Directive on damages actions.

After the *Parmalat* scandal in Italy, Ferrarini and Giudici observe that, '... the Italian and EU experiences show deficiencies as to private enforcement which materially contributed to the recent scandals in Europe and led the aggrieved investors (and *Parmalat's* Extraordinary Administrator) to seek relief in US courts.'⁸⁰⁰ They believe, therefore, that reference to US institutions in the area of private enforcement, like class actions and discovery rules, seems justified despite the failures of US law shown by *Enron*⁸⁰¹ and similar scandals. Hence, they argue that the design of substantive rules needs to be balanced by appropriate enforcement

⁷⁹⁵ Part 9 of EA 02 contains restrictions on disclosure that relate in particular to specified information regarding the business of any undertaking, s 287(1). The provisions of Part 9 apply to the OFT and other regulators, and permit disclosure by consent (s 239), and for the purpose of facilitating the exercise by the relevant public authority of its functions under the Act or any other enactment (s 241(1)). Pursuant to s 237, EA 02, the OFT kept such documents confidential, redacting them from the published version of its decisions. Since then Part 9 EA 02 should be read in conjunction with s 241A of EA 02 and SI 2007 No. 2193. S 241A was inserted by s 1281 of the Companies Act 2006. The CAT, however is not bound by these provisions in the EA 02. Schedule 4 of EA 02 applies specifically to the CAT.

⁷⁹⁶ See *Argos and Littlewoods v Office of Fair Trading (Disclosure)* [2004] CAT 5.

⁷⁹⁷ See *Aberdeen Journals Limited v Director General of Fair Trading (Confidentiality)*, [2003] CAT 14; See *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11; [2003] All ER 137 (Jul).

⁷⁹⁸ *Umbro Holdings Limited and Ors V Office of Fair Trading* [2003] CAT 26, paras 17, 35.

⁷⁹⁹ *Argos and Littlewoods v Office of Fair Trading* [2004] CAT 5, para 66.

⁸⁰⁰ Guido Ferrarini, Paolo Giudici, 'Financial Scandals and the Role of Private Enforcement: The Parmalat Case' ECGI working paper series in law, No. 40/2005, (2005) p.4; *Securities and Exchange Commission v Parmalat Finanziaria S.p.A*, Case No. 03 CV 10266 (PKC) (SDNY).

⁸⁰¹ See Krishna Palepu and Paul M Healy, 'The Fall of Enron' (2003) 17(2) *Journal of Economic Perspectives* 3-26.

mechanisms.⁸⁰² Ferrarini and Guidi conclude that the efficient US private enforcement system moves the enforcers to be faster and more reactive than their European counterparts.⁸⁰³

Italy has since adopted a class actions mechanism in 2010, designed in the model of the US system, but with the difference that the claim should be of homogeneous interest to the whole group. It is an 'opt-in' system which enables investors to claim even where they cannot show that they relied specifically on misleading or false statements when investing. However only actual damages can be claimed and not punitive damages.⁸⁰⁴

The modern day leniency programme emanated from the US, understandably, since antitrust laws were first introduced in the US as early as 1890, under the Sherman Act in order to control monopolies which operated as 'trusts'. Although the Sherman Antitrust Act was passed by the Congress in 1890, a leniency policy was not adopted until 1978, to encourage self-reporting by those who were engaged in antitrust infringements. The US DoJ claimed that considerably more cartels were discovered by their 'Leniency Program' which led many countries eventually to adopt leniency policies styled according to or similar to that of the US DoJ.⁸⁰⁵ The DoJ operates a criminal sanctions based antitrust enforcement procedure, along with civil sanctions, which has resulted in a robust enforcement system,⁸⁰⁶ with private actions playing a large part in antitrust enforcement. The Clayton Act, which offers the successful plaintiff treble damages,⁸⁰⁷ often makes such private litigation quite attractive. However, the US 2004 ACPERA limits the damages recoverable from a corporate amnesty applicant to the harm actually inflicted i.e. to single and not treble damages, if the court finds the defendant has cooperated with the plaintiffs in claiming compensation as against the other defendants. Such de-trebling is applicable only if the defendant assists the plaintiff. This feature where a defendant undertakes to compensate the victim where possible is a distinct condition in the

⁸⁰² See n 800.

⁸⁰³ Ibid, p 57.

⁸⁰⁴ Gianni, Origoni, Grippo & Partners, 'Developments in private enforcement of Italian antitrust law: the introduction of "class action" legislation' 2010 < www.gop.it/doc_pubblicazioni/49_pfljl95c6c_ita.pdf > last accessed 23.06.2015.

⁸⁰⁵ Gary R Spratling, 'Detection and Deterrence: Rewarding Informants for Reporting Violations' (2001) 69 *GEO. Wash. L. REV* 798.

⁸⁰⁶ Gregory J Werden, Scott D Hammond and Belinda A Barnett, 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions' Presentation at the 26th Annual National Institute on White Collar Crime, ABA Centre for Continuing Legal Education, Miami, 1 March 2012.

⁸⁰⁷ Clayton Act, s 4 is the successor to s 7 of the Sherman Act; Parties instituting private actions are recognised as Private Attorneys; See also Judith A. Morse, 'Treble Damages under RICO: Characterization and Computation' (1986) 61 *Notre Dame L Rev* 526.

US leniency policy compared with the EU and the UK systems. Nevertheless, there is still possibility for private damages actions against such a defendant if harm has been caused to third parties who may be in different states resulting in the defendant paying multiple damages.⁸⁰⁸ Bill Baer has said, 'Since the 19th Century, the United States has relied on a combination of federal, state and private enforcers to combat anticompetitive conduct.'⁸⁰⁹ Further, he adds, 'A high volume of private litigation in the United States means a constant flow of new competition law decisions.'⁸¹⁰

In the US, s 1 of the Sherman Act of 1890, although it has varied substantially over the years, is still in force and treats every contract or commerce in restraint of trade or conspiracy to do so in the US or with foreign nationals as illegal. Any such act is deemed to be a felony and carry heavy fines or imprisonment. The Sherman Act operates within a wider legal sphere than the antitrust law of the EU, and the rules relating to its enforcement are found in federal law. Cartels are treated as bad at any level and any individuals convicted are severely punished. The two most significant aspects that have developed over the years are the 'rule of reason' and the '*per se*' rule.⁸¹¹ Courts treat certain agreements as illegal *per se* with virtually no factual enquiry, i.e. naked price-fixing, bid-rigging, and market allocation. Such agreements are *per se* illegal irrespective of the level of the fixed price.⁸¹² The prosecution has to show only that the defendant participated knowingly in a conspiracy to engage in the act in question. The US court has moved resale price maintenance (RPM) from *per se* prohibition to the rule of reason category.⁸¹³ All horizontal antitrust violations are treated as illegal by the US courts unless it takes the form of 'ancillary restraint' operating as a part of an agreement that falls within the rule of reason and is pro-competitive.⁸¹⁴

In the EU, by contrast, the system of competition law enforcement is substantially a self-contained one. The rules have mainly emerged within the context of the competition law process. The same can be said of the UK civil competition enforcement, but as regards criminal sanctions, it operates within the wider context of the national criminal law. The most distinguishing feature between US and UK criminalisation of competition law is that in the US

⁸⁰⁸ See Nicolo Zingales, 'European and American Leniency Programmes: Two Models towards Convergence?' (2008) 5 *Competition Law Review* 6.

⁸⁰⁹ Bill Baer, 'Public and Private Antitrust Enforcement in the United States', Remarks as Prepared for Delivery to European Competition Forum, 2014, Brussels Belgium, 11 February 2014, p 1.

⁸¹⁰ *Ibid*, p 9.

⁸¹¹ See *Standard Oil v United States* 221 U.S. 1 (1911); See Robert H Bork, 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division' (1965) 74 *Yale Law Journal* 775; See also Part II (same title), (1966) 75 *Yale L J* 373.

⁸¹² See *United States v Trenton Potteries Co*, 273 U.S. 392 (1927); *Kiefer-Stewart Co. v Joseph E Seagram & Sons*, 340 U.S. 211 (1951); Mark Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success* (Edward Elgar 2012) p 55-63.

⁸¹³ See *Leegin Creative Leather Products, Inc. v PSKS Inc.* 127 S.C. 763 (2006).

⁸¹⁴ See *NCAA v Board of Regents* 468 U.S. 85 (1984).

an action for anticompetitive behaviour will either be civil or criminal. There is no simultaneous use of both avenues by public enforcers. In the UK, both civil and criminal enforcement could be applied separately in respect of the same infringement.⁸¹⁵

Decentralisation under Regulation 1/2003, although meant to pave the way for more private enforcement by the NCAs, did not dramatically change the outlook for more private actions. The reason for this can be laid at the feet of problems due to weaknesses in the substantive and procedural framework for civil litigation in the EU, as they have to grapple with complex legal and economic circumstances which are not limited to the specific cases under litigation but refer to whole markets. BIS observes, '... antitrust cases often involve complex issues of law and analysis, and require the careful identification of relevant facts and the weighing of evidence. They will only rarely be straightforward or easy cases to resolve.'⁸¹⁶

In the UK, there appears to be a reluctance to accept administrative decisions over and above those of civil procedure rules also, irrespective of the Commission Notice on cooperation.⁸¹⁷ This is well displayed in the House of Lords decision in *Inntrepreneur and Crehan*,⁸¹⁸ where the learned judges went through the case with a fine tooth comb, and decided to take a narrow approach, thereby overturning the much celebrated Court of Appeal decision in *Courage*.⁸¹⁹

With regard to private damages actions in the UK, the one and only consumer action brought so far before the CAT has been the Consumers Association's (now called 'Which?') action against JJB Sports plc.⁸²⁰ That action, however, was withdrawn as the parties agreed on a settlement, as a result there is no room for observing how a private damages action before the CAT would have been dealt with. One could point to the *Cardiff Bus* decision, where exemplary damages were awarded for the first time to a claimant for damages before the CAT, as the result of a 'follow on action' based on an infringement decision by the OFT under Chapter II CA 98.⁸²¹ That case differs significantly from the class action brought by the Consumers' Association in that the party claiming damages was a competing company. There have been at least three other damages claims brought before the CAT, under s 47A and s

⁸¹⁵ OFT's *British Airways passenger fuel surcharge* case, and the criminal prosecution arising from it, which collapsed.

⁸¹⁶ BIS, **Ref: BIS/11/758**, A competition regime for growth: a consultation on options for reform - impact assessment, para 207.

⁸¹⁷ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82, EC OJ C 101 27/04, p 54-64.

⁸¹⁸ *Inntrepreneur Pub Company (CPC) and others v Crehan* [2006] UKHL 38, [57] – [62]. Lord Hoffmann rejected the idea of paying 'deference' to someone else's (Commission's) decision, [69].

⁸¹⁹ See n 716.

⁸²⁰ See Case 1078/7/9/07 *Consumers Association v JJB Sports plc*; See Barry Rodger, 'Why not court? A study of follow-on actions in the UK' (2013) 1(1) *Journal of Antitrust Enforcement* 104-131.

⁸²¹ *2 Travel Group plc v Cardiff City Transport Services Ltd*, [2012] CAT 19, CompAR 211; Under CRA 15 reforms no exemplary damages will be available to victims.

47B of CA 98, that have been settled.⁸²² As settlement agreements are confidential, and not available to the public, there is no way of examining these claims.

After the *JJB* settlement, the only private action brought since CA 98 came into force, the head of legal affairs at 'Which?' Deborah Prince, said that she was never going to bring any collective action under the 'opt-in' system, as it was very time consuming and expensive, and was not worth the trouble in the end. She believed an 'opt-out' model was more suitable than the 'opt-in' system under which the action had to be brought at the time.⁸²³

Under the new reforms brought in by the ERRa 13 and the CRA 15, the position has changed, and victims will now be able to choose an opt-out Collective action for damages, provided certain conditions are met. The results of the new changes can only be observed over a period of time. Meanwhile, a recent collective action filed under the new rules before the CAT, by former chief Financial Services Ombudsman as the proposed representative, of the class of UK consumers that have suffered loss over fees charged by MasterCard, was dismissed by the CAT.⁸²⁴

7.2.1.3 Conclusion

Private actions for damages are deemed to be a parallel deterrence mechanism against potential cartel formation. The CJEU has emphasised the individual's right to redress in the landmark case *Courage v Crehan*. Private actions were expected to strengthen compliance alongside public enforcement. However, private actions appear to be the least used EU wide. The problem faced by victims is that they are required to prove that the harm caused to them was a direct result of the infringement, but have difficulty in obtaining documents which are key to ensuring effective enforcement of private damages actions. The reason for this difficulty is that infringers are given confidentiality over their business secrets and leniency applications. In the UK, there appears to be also a reluctance by the courts to accept administrative decisions over and above those of civil procedure rules. This is well displayed in the House of

⁸²² See Case 1060/5/7/06, *Healthcare at Home v Genzyme Ltd* [2006] CAT 29, the CAT awarded interim damages in the case, a first for CAT; See Case 1088/5/7/07, *JJ Burgess & Sons v W Austin & Sons and others*; See also Case 1108/5/7/08, *N J and DM Wilson v Lancing College Ltd*.

⁸²³ See Alberto Martinazzi, 'Class Representation: Opt-in, Opt-out or Representative Action?' (2011) 4 (2) *CPI* 2; See also Astrid Stadler, 'Collective Action as an Efficient Means for the Enforcement of European Competition Law' in Jurgen Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer Law International, 2007), pp.195-216 - Opt-in collective actions are not likely to constitute a solution to minor and dispersed damages, p. 202, 211; Abigail Townsend, 'Under the new ERRa, an "Opt-out" system has been introduced' *The Lawyer*, 18 March 2011 <www.lawyer.com/competition-which?/1007296.article> accessed 10.07. 2014.

⁸²⁴ See *Walter Merricks CBE v Mastercard Inc and Others* [2017] CAT 16.

Lords decision in *Inntrepreneur v Crehan*,⁸²⁵ whereby the much celebrated Court of Appeal decision in *Courage* was overturned. Decentralisation under Regulation 1/2003 has a greater risk of divergent application of the EU competition enforcement rules, particularly if the enforcement functions of investigation, decision making and enforcement may be carried out by the same enforcement authority.⁸²⁶ More importantly, the new Commission Directive on damages actions which intends to encourage more private actions, may enhance the opportunities for divergence by national courts, with the claimants unable to access leniency documents which may be crucial to their cases.⁸²⁷ The Directive has decreed that leniency documents should never be disclosed, as opposed to the decision in *Pfleiderer* which left it for NCA's to decide on a case by case basis. A solution may be found if a mechanism with rules for case allocation and consistent application of EU antitrust law is set up, respecting the principles of judicial independence, and procedural autonomy. However, as long as courts look upon antitrust private actions in isolation, disregarding the wider issues of competition in the market, private actions in the UK will remain a distant expectation.⁸²⁸ Moreover, Collective actions as introduced by the CRA 15 in themselves will not be an alternative enforcement in order to achieve optimal deterrence. This is particularly so, minus the necessary tools such as access to evidence, and funding for potential victims. A victim who is in a position to bring an action is first faced with the question of nondisclosure, and lack of transparency by companies, which obfuscates the chance of obtaining the required evidence, particularly where leniency has been granted to a guilty party. The consumer, as victim, is not always aware of the harm caused to him as the consumer only sees a small piece of the jigsaw puzzle, which fact needs to be taken seriously by the policy makers.⁸²⁹

Although private actions are an effective tool to steer companies towards compliance with antitrust law, it is difficult to fathom the development of private actions in the UK (or the EU) to the extent it has in the USA, for fear of 'flood gates opening'. As it stands, competition policy in the EU and the UK appears more geared towards protecting the institutions of competition,

⁸²⁵ See n 818.

⁸²⁶ Wouter P J Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 (2) *World Competition* 201-224.

⁸²⁷ Ibid; The new EC Directive on damages actions was passed by European Parliament on 17 June 2014.

⁸²⁸ The Commission provides funding for training judges in EC competition law developments and assessing economic evidence, but there is no Commission associated training network. (There are, however, the Association of European Competition Law judges and the European Judicial Training Network which are not linked to the Commission). It may be said that unlike enforcement authorities, courts do not enjoy broad investigatory powers, and in any event lack the power to investigate non-parties to the action or the industry as a whole.

⁸²⁹ See Eduardo Reyes 'Competition law isn't up to the job' *The Law Society Gazette*, 09.08.2016.

rather than the protection of consumer rights which remain an incidental subsidiary aim of competition enforcement.⁸³⁰ It can safely be presumed that it would take decades before private actions in antitrust claims become a useful or effective mechanism in deterring anticompetitive behaviour in the UK or the EU.

This Chapter has illustrated that leniency, far from helping the customer or the consumer, in reality restricts them from taking action against colluding firms that cause them harm. Therefore, the expectation that private actions would enhance enforcement of competition law has not materialised. Hence, the second objective stated in the Introduction of this thesis that leniency hinders private enforcement has been met. The next chapter will deal with the third objective, of proposals for reform in order to enhance and expedite enforcement of competition law.

⁸³⁰ Temple Lang, 'European Community Competition Policy – How far Does It Benefit Consumers?' (2004) 18 *Boletín Latinoamericano de competencia*, 128; Case T-184/01 R *IMS Health Inc v Commission* [2001] ECR II-3193, [145], stressed consumer welfare but on appeal a contrary view by President Rodríguez Iglesias stated 'protection of the interests of competing undertakings' should not be excluded; See also Case C-481/01 P(R) *NDC Health Corporation and NDC Health GmbH v IMS Health Inc* [2001] ECR I-3401, [84].

CHAPTER 8

Conclusion

8.1 Contribution to Knowledge and Value Added by this Thesis

The UK competition enforcement authority has introduced a Leniency Programme in accordance with the EU Leniency Notice,⁸³¹ as a complementary enforcement method in order to enhance the detection and deterrence of anticompetitive behaviour prohibited under Chapter I, Competition Act 1998. This research sought to ascertain the efficacy of the Leniency Programme by a study of the cases decided and published by the UK's former principal enforcement authority, the OFT (currently the CMA), over a period of twelve years. The findings illustrate that the Leniency Programme has not been able to meet the desired increase in the detection of Chapter I prohibitions in the UK.

The legal frame work within which Chapter I prohibitions are dealt with under the UK competition law, though strong,⁸³² it has been revealed that the UK has reported fewer antitrust cases than a number of other Member States in the EU.⁸³³ This is despite that the former Department of Business Innovation and Skills (BIS) has hailed UK's competition regime as world class.⁸³⁴

The most serious competition infringements occur as a result of business agreements between two or more economic entities with the intention of accumulating a higher profit at the expense of consumers who use their products and services. These agreements, referred to as cartels, are usually informal and can be mere verbal or implied terms using coded messaging or signals. Thus, cartels operate in secret, making it difficult for enforcement authorities to detect them. Therefore, a Leniency Programme has been put in place hoping

⁸³¹ See n 7.

⁸³² See sec 1.3 and sec 2.4.2.

⁸³³ See sec 5.1.

⁸³⁴ See n 132.

that it would encourage colluding firms to come forward and disclose their cartel activities in exchange for immunity from prosecution or reduction in fines.

In the UK, the Leniency Programme has been hailed as the bedrock of competition enforcement by the BIS itself.⁸³⁵ However, it is evident from the decided cases that very rarely have colluders ventured out to disclose such activities unless there was a good chance of getting caught. The architects of Leniency in competition enforcement appear to have largely ignored this aspect of cartel behaviour. This thesis has provided evidence by examining the cartel investigations and decisions made by the UK's former principal enforcement authority, the OFT, that leniency is not an efficient method of detecting cartels.

This work illustrates by exploring and analysing decided cases that the role played by leniency in the enforcement of competition law in the UK is very limited, contrary to the view held by its proponents. The results of the study contribute towards highlighting the limitations in relying on leniency as an essential tool in antitrust enforcement, revealing the reasons for UK's poor record of antitrust cases as acknowledged by the BIS.⁸³⁶

By examining Chapter I, CA 98 cases decided by the OFT, over a period of 12 years, since CA 98 came into force, this research has shown that the Leniency Programme does not serve to make businesses engaged in anticompetitive behaviour rush forward with applications in order to divulge their anticompetitive behaviour in return for immunity. The study has also illustrated that notwithstanding the secrecy of cartel activity, the colluders leave behind a trail of evidence which the regulators have the authority, and the capacity to seize, thereby disproving the claim that obtaining evidence in cartel cases is difficult without leniency. Further, the research has shown that granting leniency does not save the limited resources of the enforcement authorities, as claimed, because instead of being able to dispose of the cases expediently owing to defendants coming forward and providing the evidence, investigations had taken an inordinate length of time, the *Tobacco*⁸³⁷ case being one example. Despite granting leniency with full immunity, the protracted nature of the investigations takes up the limited resources, and time, away from direct intervention and investigations by regulators which would otherwise have raised the risk for potential infringers, thereby motivating compliance and self-policing by businesses. Importantly, it is also apparent from the study, that confidentiality granted to Leniency applicants has become a barrier for victims in obtaining vital evidence needed, to bring private actions for compensation.

⁸³⁵ See n 25.

⁸³⁶ See sec 5.1.

⁸³⁷ See sec. 5.17.

Hence, the research has illustrated that relying on leniency programmes to deter anticompetitive behaviour by businesses, overlaps and undermines the active (ex officio) enforcement of competition law. These findings negate the hitherto held position by the enforcement authorities and other interested groups that leniency contributes massively in detecting anticompetitive behaviour.⁸³⁸

The OFT cases demonstrate that applying the penalty procedure can be complex,⁸³⁹ adding a different dimension to it at the appeal stage, in particular. Even when the OFT decision is upheld on liability, the CAT has often reduced the fines so that the defendants seem to be let off lightly. Such lenient treatment of infringers can only be counterproductive. An effective competition regime needs to root out anti-competitive activity and provide a significant deterrent effect. The decisional complexity and delay add to inefficiency and cost, which probably resulted in OFT reporting fewer antitrust cases than some other Member States.

The complexity in reaching a fair balance between the infringement and the penalty is further illustrated by various economic theories relating to Leniency granted to cartel participants.⁸⁴⁰ Chapter 3 shows how economists keep experimenting on mainly the formation and destabilisation of cartels in the context of how participants react to Leniency Programmes. The varying number of results produced by these experiments though interesting, could give rise to confusion where decisions on cartels are concerned, because designing a leniency programme to suit complex factors such as different localities, product markets or industries, and political and cultural differences in those localities would not be feasible. Economic theory alone can often be abstract, and reliant on assumptions that are not always realistic, therefore, it needs to connect with real life situations. Despite these drawbacks, economic theories present circumstances around the functioning of cartels that could lead to formulating better solutions for deterrence. In that sense, Harrington and Chang state a truth when they find that Leniency programmes can be counterproductive when penalties are not severe enough, and the amount of resources saved by prosecuting a leniency case is not large enough.⁸⁴¹

The cases investigated and published by the UK's principal enforcement authority under Chapter I, CA 98, between 2001 and April 2012 numbering 24 are illustrative of a set pattern adopted by the authority in deciding such cases, under a penalty Guidance. Out of the 24 cases, two were applications for clearance not involving leniency,⁸⁴² one of them later turning

⁸³⁸ See n 12, n 23, n 24 and n 25.

⁸³⁹ See Chapters 4 and 5.

⁸⁴⁰ See Chapter 3.

⁸⁴¹ See sec 3.4.

⁸⁴² See Chapter 5, sec 5.12 (*Attheraces*) and sec 5.14 (*MasterCard*).

into a full investigation due to a complaint received by the enforcement authority.⁸⁴³ Most of the rest of the 22 cases dealt with involved price fixing. In the construction sector cases, the offences concerned bid rigging or cover pricing in the main, involving a large number of construction companies, with the OFT selecting only some which had sufficient weight of evidence for investigation. At the time the investigations started, the *Construction Industry*⁸⁴⁴ cartels had come to an end sometime ago. In these cases, the CAT even observed that as those practices were widely used in the industry they should not be taken as serious offences,⁸⁴⁵ even though the damage could not be easily assessed by the OFT in the cases due to the continuous nature of the harm to the victims who were essentially local authorities.

Significantly, of all the OFT investigations over a twelve-year period there has been only one leniency applicant who seemingly volunteered to approach the OFT *before* any looming investigation.⁸⁴⁶ Two others applied as they were aware investigations were likely.⁸⁴⁷ Another made the application just prior to giving notice of a merger.⁸⁴⁸ All other eighteen cases made applications only after the OFT started an investigation. Despite the enforcement authorities' dependence on the Leniency Programme, this illustrates colluders are not enthusiastic about coming forward with confessions of their anticompetitive activities. These cases have demonstrated the actual operation of Leniency in the enforcement of the UK competition law, exposing the limited role it plays in detecting cartels.

Incredibly, even after total immunity has been granted, some defendants were found to have concealed evidence, or lied at the investigation stage.⁸⁴⁹ The unreliability in the evidence provided by some of the leniency applicants, was discovered only at the appeal stage.⁸⁵⁰ In the *Airline Fuel Surcharge* case, it was later found that the immunity recipient VVA had not disclosed a large number of email evidence to the OFT.⁸⁵¹ Further, even when leniency applicants were supposedly cooperating fully, the cases have dragged on for years,⁸⁵² which meant that the OFT's scarce resources were stretched to the limit,⁸⁵³ thereby negating the costless assertion as one of the reasons for leniency policy.⁸⁵⁴ This position was aggravated by several of those who were granted leniency by way of reduction in fines, appealing the OFT

⁸⁴³ Ibid, sec 5.14.

⁸⁴⁴ Ibid, sec 5.24.

⁸⁴⁵ Ibid.

⁸⁴⁶ Ibid, sec 5.15.

⁸⁴⁷ Ibid, sections 5.9 and 5.11.

⁸⁴⁸ Ibid, sec. 5.25.

⁸⁴⁹ Ibid, sections 5.5 and 5.11.

⁸⁵⁰ See sec 5.5.

⁸⁵¹ See sec 5.11.

⁸⁵² See sec 5.17 (*Tobacco*), in particular.

⁸⁵³ See sec 5.24, *Construction Industry*.

⁸⁵⁴ See Chapter 3, sec 3.2.

decisions. The length of a case adds to the cost, and the authorities are left with less time for ex officio investigations.

The surprise finding from the study of the cases was the amount of documentary evidence that the OFT was able to recover in all the cases which again destroys the claim that hard evidence is not available in cartel cases. The authorities have the power to enter premises and seize such documentary evidence as has happened in many of the OFT cases.

It is also noteworthy that those companies granted full immunity are protected from criminal prosecution or any other penalties imposed on them. Thus the infringing companies can keep the profits of their illegal activities on leniency being granted, and they also gain the additional reward of not having to pay any costs towards the investigation proceedings. This complete exemption from all liability appears to defeat the enforcement authorities' attempt at deterrence of anticompetitive behaviour. Moreover, although in most of the cases senior officials were involved, the OFT did not see fit to prosecute any, except in the failed VAA case, nor was any action to bring at least a disqualification order was taken against any of them.⁸⁵⁵

Leniency also has posed problems for victims in instituting private actions due to inaccessibility of evidence which is safeguarded by confidentiality clauses. Leniency comes with the proviso of nondisclosure of the Leniency documents other than with the consent of the party or parties providing them, which prevents victims accessing them in private actions. While in *Pfleiderer*,⁸⁵⁶ the CJEU left open for the national courts to determine whether relevant material could be made available to a victim, and the English court has made use of that decision in *National Grid*,⁸⁵⁷ a subsequent EU Directive has decreed that leniency documents should never be disclosed.⁸⁵⁸

It is amply demonstrated by this research, particularly by the OFT cases in Chapter 5, that the Leniency policy does not play a major role in detecting anticompetitive behaviour. Nor does Leniency appear to stop new cartels forming.⁸⁵⁹ It therefore raises the question why enforcement authorities adhere steadfastly to such a policy of rewarding cartel participants. The clue can be discerned from Lord Simon's emphasis on the critical importance in minimising burdens on business, during the House of Lords debate.⁸⁶⁰ He has stated that the UK competition law has been made to align with the corresponding Commission prohibitions

⁸⁵⁵ See sec 5.2.5.

⁸⁵⁶ See sec 7.2.1.

⁸⁵⁷ See sec 7.2.1.1.

⁸⁵⁸ See sec 7.2.1.2.

⁸⁵⁹ See Chapter 6, sec 6.3.7.

⁸⁶⁰ Ibid, sec 6.3.6.

for that very reason.⁸⁶¹ It is, therefore, questionable whether the much repeated ‘consumer welfare’ paradigm by regulators was at the heart of competition law. Indeed, the single market was the core goal of the Treaty of Rome, with building a single market taking shape from 1958, and key decisions taken by government ministers with little reference to public opinion.⁸⁶²

As shown in Chapter 3 of this thesis, economic theorists have highlighted the difficulty in making a proper empirical assessment of the extent to which cartels exist due to lack of data on the hidden infringements. The economic theories have variants that do not definitively show that leniency produces the desired effect. In fact, some of the theories show that leniency can lead to increased cartel activity.⁸⁶³ As explained in Chapter 6, the ineffectiveness of leniency is apparent by the fact that more and more cartels appear unabated despite high fines.⁸⁶⁴ In the US, long jail terms being imposed for cartel infringements have not given rise to an abatement of new cartel formation either.⁸⁶⁵ Therefore, it is unfortunate that both enforcers and economists appear to be simply paying lip service to the concept of maintaining a competitive market, whether it be domestic or global, by leaning heavily on Leniency policy to detect antitrust infringements.

The principle of applying Leniency by different enforcement authorities in cartel cases is the same in different jurisdictions, while there are certain operational and punishment differences.⁸⁶⁶ There are differences among member states of the EU itself in this regard, paving the way for forum shopping. This is a drawback for effective use of leniency as markets work in a globalised environment with many multinational corporations operating around the world having networks, branches, subsidiaries, and sometimes under different trade names. Where punishment for anticompetitive behaviour is concerned, it is apparent that the US leads the way, with private actions taking a lead. There is robust implementation of both administrative and criminal sanctions in the US antitrust regime. Yet full convergence is not likely to happen with the EU, and even less likely worldwide, given different sovereignty safeguards, laws, and the enforcement agencies.

⁸⁶¹ Ibid.

⁸⁶² See n 618.

⁸⁶³ See Chapter 3, sec 3.4, sec 3.4.1 and sec 3.4.4.

⁸⁶⁴ See sec 6.3.7.

⁸⁶⁵ See sec 6.3.7.

⁸⁶⁶ See sec 2.4.2

UK enforcement authorities' penalty Guidance which is fashioned according to EU guidelines is unduly complicated, and has given rise to much criticism. This is an area which needs to be made simple and coherent, so that the defendants can have a fair assessment of the penalty they will have to pay, and perhaps minimise the chances of appealing on penalty grounds⁸⁶⁷ On the other hand, it would be far better to do away with the penalty Guidance as it stands, and have a separate competent Committee decide on the penalty to be imposed once the breach is proved. Members can be chosen from the same enforcement authority or the court may make an order as it thinks fit in that regard. A number of cases that appealed the OFT decisions, have done so mainly on the penalty issue. Appeals have also lengthened the duration of the cases unduly. Notably, the NAO has observed that there is a perception among Regulators and the OFT (now CMA) that the UK enforcement system, including the likelihood of appeal to be an onerous process.⁸⁶⁸

As antitrust investigations are essentially administrative in the UK, bar the potential criminal cases which may or may not take place separately, it would fare better if an inquisitorial method is adopted for the contested antitrust cases. This is more so since the CAT, which has adopted an adversarial stance in the past, has now been empowered to hear stand-alone antitrust cases also.⁸⁶⁹ Not only does the adversarial nature of these arguments distort the primary intention of antitrust law, but also it invariably lengthens the procedure giving rise to an unacceptable duration for a case to be concluded.

Tribunals and courts should be able to place an emphasis on the central aim of maintaining competition in the market. Decisions must take keen account of the impact of distortion in the market, and the damage caused to the economy which in turn is injurious to the consumer. Courts should be concerned not only with the economic effect of anticompetitive behaviour but also with non-economic effects, and take into account any injury to social or domestic interests, and other concerns emanating from a breach. Taking into account the whole package from a policy point of view can direct the judges' attention to the question of justification of the court's decision. The approach taken by Lord Reid in *Esso Petroleum* is more appropriate in this regard.⁸⁷⁰

⁸⁶⁷ See Chapter 5.

⁸⁶⁸ See n 227.

⁸⁶⁹ See section 1.5.4.

⁸⁷⁰ See n 639.

8.2 Options for Reform

This thesis has found that Leniency is not an efficient detection method in antitrust enforcement in the UK, contrary to the view held by its proponents. One of the arguments put forward by the proponents of Leniency Programmes, is that it will help the limited resources available to the enforcement authorities. This may well be true in some instances, but the UK's decided cases have shown that it is not so most of the time. Therefore, the available resources should be utilised in a more meaningful way where concentrations are greater, than spreading it out equally in lesser, smaller investigations.⁸⁷¹ This can be achieved by setting up a comprehensive market surveillance mechanism. That way resources could be utilised more usefully. The best way, it is suggested, to keep up with the working of the market is enabling businesses to set up an **open and transparent** governance structure. The BIS has already passed an Act of parliament to attain this end to a certain extent with regard to small businesses.⁸⁷² What is needed is a similar, but more encompassing regulatory legislation to oversee the operation of larger corporations that may or may not have links around the globe. Transparency has become the byword of almost all other areas of governance, the Freedom of Information Act 2000 being the prime example, as it should be, and therefore, corporate governance should not be an exception. It is noteworthy that IOSCO has set out transparency as one of the important factors in their objectives and principles.⁸⁷³

With transparency, individual responsibility could be traced, so that individuals can be identified and prosecuted if culpable. The inclusion of independent members, and employees nominated by or voted for by the employees themselves as board members may also help towards reducing blatant anticompetitive activities. Corporations must have the oversight of independent auditors who have no links with the companies they are entrusted with overseeing. Companies could be asked to provide quarterly reports of their business involvements including profit targets allowing transparency of their business dealings. Tax returns could be one of the ways of determining a firm's profits.

Such steps must be backed up by a strong enforcement system, whereby once convicted of an antitrust breach, the defendant should be either fined a mandatory fine of the firm's total

⁸⁷¹ See sec 3.4.3.

⁸⁷² Small Business, Enterprise and Employment Act 2015.

⁸⁷³ See sec 6.4.3.

profits for every year of the violation or bring criminal charges against those involved, or both, depending on the severity of the damage caused. In extreme cases, the system should not be averse to implementing both fining, and prosecution of individuals, with regard to the same or connected violations. For repeat offenders, an effective method will be to disqualify them from operating at least in the market in respect of which the infringement was committed.

Nevertheless, prevention is better than cure. Constant market surveillance and monitoring by regulators, auditors, consumer organisations in coordination rather than separately would yield a better outcome in this regard. It would, perhaps, encourage companies if a rating or ranking system is put in place whereby companies are graded according to their compliance procedures. This means those undertakings that are found to have observed compliance to the full, in accordance with the applicable measures, can be given gold standard. It would be in the interest of companies to aspire to attain gold standard, and consumers and customers will be able to do their research according to the rankings before dealing with a company at a glance (if they are looking for a quick guide). If such companies were found to have committed a breach subsequently, their high ranking should be revoked, and sanctions imposed promptly.

Transparency is the key word, as market transparency contributes to an effective price formation process, and to the integrity of markets. It can facilitate detection of potential risks, and help contain panic in times of stress. Transparency, and disclosure will help regulators identify concentrations of risk that may warrant further regulatory or legislative responses. Hiding behind the cloak of 'sensitive and confidential business secrets' can encourage collective behaviour which can lead to widespread losses with adverse consequences for the economy. It is also important to keep in check the global linkages of companies when collecting data for analytical purposes. Thus a well-functioning central mechanism should be put in place to oversee competition in the market which will lead to innovation, and fair prices, contributing towards maintaining a healthy economy.

In order to maintain the credibility of enforcement, fair process is essential which must be followed by soundly reasoned evidence based decisions. However, enforcement authorities work within a statutory framework which limits their ability to improving competition in the market. Hence, it is important that businesses are confident in themselves to function fairly as well as freely. This can only be achieved if businesses could be open, transparent and dynamic.⁸⁷⁴ Further, businesses should be willing to discuss their roles including their problems with the authorities, professionals and advisers. In the absence of such

⁸⁷⁴ See sec 5.4.2.

understanding, and dialogue, distrust will prevail and the fear (of 'getting caught') would inevitably result in the 'prisoner's dilemma' of anticompetitive behaviour. It is suggested, that the new UK Competition Network (UKCN),⁸⁷⁵ created by the CMA might be an appropriate venue that can be developed into accommodate an advisory board to assist businesses by the appointment of competent and experienced staff.

Only transparency and disclosure will establish standards that will permit the market place to contribute constructively to policing excessive risk taking. The regulators can only identify concentrations of risk if the tools of transparency and disclosure are available.

Leniency, although a weak mechanism, could still be used in extreme cases where a colluding party who is in a weaker position than the others, such as a distributor or retailer who has been coerced to enter into a cartel (for example, by a manufacturer), who does so for fear of losing his business.⁸⁷⁶ In fact, it should only be used as a ruse to motivate lower level whistleblowers such as employees, and those who have been coerced due to their dependence on the business that the colluders provide. Therefore, vertical agreements are where leniency should be considered.

8.3 Coordinated Market Surveillance is Key

The alternative solution proposed by this thesis, is therefore composed of a composite structure, enabling transparency in the market. Possible measures leading towards accomplishing that could involve:

Setting up a market surveillance mechanism where separate areas of industry are covered by independent auditors who will not be paid by those industries. Setting up a public register where all those who control a given business must register their interests including those who have control by virtue of the number of shares held by them in that business.⁸⁷⁷ Businesses must submit their profit margins including the actual profits gained every quarter year to the revenue office so that there is transparency, and problems such as money laundering, and concentrations could be spotted early. A dispute-resolution panel or board consisting of regulators or other competent persons should be appointed that can assist businesses that need direction and help in solving their particular major marketing problems which are out of their control in the main. Assistance could be made available for any other business-connected matters that businesses wish to seek advice on. More importantly, all these measures must

⁸⁷⁵ See n 225.

⁸⁷⁶ See Chapter 5, (*Lladro Commercial SA*), sec 5.8.

⁸⁷⁷ This is a measure already laid out for small businesses under the regulations of the new Small Business, Enterprise and Employment Act 2015.

be interconnected so as to form a central mechanism whereby information is relayed quickly for regulators to take action promptly.

Enforcement authorities must use their regulatory powers vigorously when investigating anticompetitive behaviour, and be vigilant in detecting trouble spots rather than rely on leniency applications. Therefore, careful monitoring is essential in order to avoid the mistakes that occurred in cases such as *Enron* and *Parmalat*.⁸⁷⁸ In any event, criminal prosecutions must be at the forefront of dealing with cartel participants after proper investigations and conviction. Businesses should be stripped of their right to confidentiality with regard to their business secrets on being found guilty of a breach of competition law, and individual liability imposed on those who are responsible for the breach. Those responsible must be made answerable, irrespective of whether the responsible person or persons have left the business concerned. Leniency should only be afforded in extreme situations such as to a victim of coercion, and whistleblowers who are strictly non participants, but may be subject to victimisation by the business concerned.

It may well be that these measures could sound draconian in the ears of businesses who believe in their right to business secrets, and still in the throw of 'too big to fail' mind set. It is for the enforcement authorities to inform, educate, and alleviate that fear by offering help and support to businesses experiencing difficulties. Therefore, it is essential that the most suitable individuals are appointed to the relevant positions who will be of sound business sense, and free of conflict of interest. Negotiation and settlements may be preferable to costly investigations from the enforcement authority's point of view, but settlement measures taken must be made available to the public without any confidentiality compromises, so that victims can seek remedial action against those responsible for harm caused to them. If consumer welfare is at the heart of competition law, nothing should be kept secret from consumers where collusion occurs. That should be the first principle of competition law. Law breakers should be punished severely once convicted. Therefore, criminal prosecution must be at the forefront of dealing with cartel participants who 'prevent, restrict, or distort' competition in the market.

If the enforcement authorities are vigilant, with quick intervention in problem areas, and the penalties are severe enough, the markets will look after themselves stimulating growth by selecting the most efficient firms, without adding cost to the public purse. Competitive markets with discipline will bring about efficiency, making companies more productive and innovative leading to lower prices, benefiting the consumers.

⁸⁷⁸ See n 678 and n 680.

8.4 Future Research

Further research is important for new ways to detect and deter anticompetitive activities, as undertakings are bound to contrive novel ways to facilitate cartels. One aspect that needs clarification in detecting cartels, is parallel behaviour. So far, an answer to what constitutes parallel behaviour, that can be identified as anticompetitive in order to bring a successful investigation has been lacking.

There are several other areas of interest where economic laboratory tests could help, one being a sound method of assessing damages due to cartel activity in a given market, together with a better penalty calculation procedure which corresponds to the damage caused. Economists whose laboratory tests produce numerous variations of how best to apply leniency could also use their skills, perhaps, in developing an alternative and effective enforcement method of competition law that can weather the fast changing global economic conditions. In doing so, factors such as ethics, environment, and human rights could also be taken into consideration together with transparency, in keeping with the growing global concern around such criteria for corporate governance. These factors were under discussion at the Global Law Summit held in 2015, addressed by experts from around the world in varying fields of law and business.⁸⁷⁹

Compliance is another area for research as current regulations do not appear to be taken seriously by businesses. Perhaps, compliance should be at the forefront of enforcement rather than the allure of leniency and immunity for colluders. Another important area is the antitrust investigation or prosecution procedure which needs streamlining for faster and successful results which can increase the deterrent effect of the antitrust prohibitions. A starting point could be delving into the reasons for not using EA 02 in bringing criminal prosecutions more vigorously in the UK, particularly in view of the BIS agreeing that a 'prosecutorial system would likely provide greater efficiency' and fairness, in its response to the Options for Reform consultation.⁸⁸⁰

⁸⁷⁹ Global Law Summit held in London, February 2015. The Queen Elizabeth II Conference Centre, and Central Hall Westminster, London.

⁸⁸⁰ BIS, Growth, competition and the competition regime; Government response to consultation, 2012, para 6.19 at 55.

Researching problems faced by emerging nations wishing to adopt competition law or those that already have adopted competition law but are facing various obstacles⁸⁸¹ can provide food for thought in further enhancing effective enforcement of competition law. Forming institutions by themselves, however, will not invariably lead to good or effective enforcement unless there is an active and efficient mechanism for overview of the market structure.⁸⁸²

⁸⁸¹ Choudhury, Michelle, 'The political economy of competition law reform in new jurisdictions', in Richard Whish and Christopher Townley (eds), *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Edward Elgar, 2012).

⁸⁸² Ibid.

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